TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 263.

SETH A. FOWLE AND HORACE S. FOWLE, PARTNERS AS SETH W. FOWLE AND SON, APPELLANTS,

vs.

JOHN D. PARK, AMBRO R. PARK AND GODFREY PARK, PARTNERS AS JOHN D. PARK & SONS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED APRIL 30, 1896.

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1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and the western division of the southern district of Ohio, begun and held at the court-rooms, in the city of Cincinnati, in the said division and district aforesaid, on the first Tuesday of February, being also the second day of that month, in the year of our Lord one thousand eight hundred and eighty-six, and in the one hundred and tenth year of the Independence of the United States of America—present, the Honorable John Baxter, circuit judge—among the proceedings had were the following, to wit:

SETH A. FOWLE and HORACE S. FOWLE, Partners as Seth W. Fowle and Sons, Complainants,
vs.
JOHN D. PARK, AMBRO R. PARK, and GODFREY F. PARK, Partners as John D. Park and Sons, Respondents.
} In Equity. No. 3624.

2 Be it remembered that heretofore, to wit, on the twenty-eighth day of March, in the year of our Lord one thousand eight hundred and eighty-four, came the said complainants herein, by Messrs. McGuffey and Morrill, their solicitors, and filed in the clerk's office of the court aforesaid in this cause their certain bill of complaint against the said defendants aforesaid, clothed in the words and figures as follows, to wit:

3 *Bill of Complaint.*

In the Circuit Court of the United States for the Southern District of Ohio. In Equity.

SETH A. FOWLE and HORACE S. FOWLE, Partners as Seth W. Fowle and Sons,
vs.
JOHN D. PARK, AMBRO R. PARK, and GODFREY F. PARK, Partners as John D. Park and Sons.

To the honorable the judges of the circuit court of the United States for the southern district of Ohio, western division:

Seth A. Fowle and Horace S. Fowle, a firm doing business as partners under the name of Seth W. Fowle and Sons, and having their place of business in Boston, in the State of Massachusetts, and both being citizens of that State, bring this bill of complaint against John D. Park, Ambro R. Park, and Godfrey F. Park, a firm doing business in the city of Cincinnati, county of Hamilton, and State of Ohio, all being citizens of said State of Ohio.

4 And thereupon your orators complain and say that on and prior to the year A. D. 1844 one Lewis Williams, of the city of Philadelphia, prepared, invented, and compounded a certain medicinal preparation of great and substantial value for certain

agreed that the said Seth W. Fowle should have entire control of such sales in said territory west of the ridge of the Rocky Mountains free of all competition on the part of said John D. Park, the latter being paid a valuable consideration therefor by the said Fowle; that this arrangement continued until after the death of the said Fowle, in A. D. 1867, and until on or about 1869, when the same terminated; that on the 17th day of November, A. D. 1869, the said John D. Park entered into an agreement with Seth A. Fowle, one of these complainants, and the said Lucy A. S. Fowle, whereby, in consideration of five thousend dollars ($5,000.00) paid him by them, he did sell, assign, and transfer and convey to them, as copartners, and their legal representatives and assigns, all his right, title, interest, and claim in and to the property or proprietary rights or franchise of, in, and to the medicine or
10 medicinal preparation called and known as Wistar's Balsam of Wild Cherry, for and as regards all the territory or part of North America lying westerly of the ridge of the Rocky Mountains, embracing the following States and Territories, to wit: The States of California, Oregon, and Nevada and the then Territories of Washington, Idaho, Utah, Arizona, and Alaska, and such parts of the then Territories of Montana, Wyoming, Colorado, and New Mexico as lie westerly of the ridge of said mountains, and also the Territory of British Columbia and the Republic of Mexico, as embraced in their then domain, and also all his right, claims, and interest in and to the good-will of the business of making, putting up, and selling said balsam within said limits, and in the trade-mark as used in said limits on the labels, bottles, wrappers, or packages containing said medicines or in carrying on the business therein, the said Park stipulating for himself, his assigns and representatives, in said agreement that the said Seth A. and Lucy A. S. Fowle and their assigns should have and enjoy the sole and exclusive right of selling said medicine within said limits so far as he or they could assume the same free from any competition or interference
11 by him or any one under him, or by his authority, permission, or aid, either directly or indirectly; and he did further agree, for himself and his assigns, heirs, and representatives, as a part of said transaction and for said consideration, that neither he nor they would make, put up, sell or offer or expose for sale any of said balsam, or any other medicine bearing said name in whole or in part, nor the said medicine or a medicine substantially the same, under a different name, in said territory.

And that neither he nor they would use the same under a similar trade-mark or be concerned, directly or indirectly, in the business of selling or in any way promoting the sale of said medicines in competition with said Seth A. and Lucy A. S. Fowle or their assigns, and that neither he nor they may do or knowingly aid or abet any other person to do anything to prejudice or interfere with the business of the sale of the same within said limits solely by said Seth A. and Lucy A. S. Fowle and their assigns; and further, he agreed that he, his assigns, executors, and administrators, would, upon reasonable request at any time, do such further acts as might be

necessary and expedient to enable the said Towles to realize
12 and enjoy the full benefit and advantage intended to be assured to them by said instrument made, as aforesaid, in 1869.

And your orators further say that in July, 1872, by contract with and purchase from the said Lucy A. S. Fowle, they acquired all her rights to, under, and by virtue of said contract of 1869 by said John D. Park, with respect to the manufacture and sale of said balsam and the use of the name "Wistar's Balsam of Wild Cherry" in said territory, and have ever since and are now entitled to the exclusive enjoyment thereof therein.

They further say that the above-named copartners of said John D. Park derived all their interest in and right to the manufacture and sale of said balsam since the execution of said contract of 1869 from said John D. Park, and with full knowledge and subject thereto, as they are informed and believe.

Your orators also say that the defendants and each of them have wholly failed to comply with the requirements of said contract between the said Lewis Williams and the said Sanford & Park, in this, that they have during and for the ten years last past sold and caused to be sold, and sold with the knowledge, or reason to
13 know, that the same was to be resold, said balsam in said territory comprised in the transfer to Isaac Butts aforesaid, in large quantities, in competition with the trade of these complainants, therein greatly injuring them, under the name of Wistar's Balsam of Wild Cherry.

Further they say that the defendants and each of them have sold and caused to be sold, there and elsewhere, said balsam at a less price than seven dollars ($7.00) per dozen, all in violation of said agreement and to the injury of these complainants, and have violated their duty in the premises, in this, that they have sold and caused to be sold, and are selling and causing to be sold, said balsam in said territory, under the name of "Wistar's Balsam of Wild Cherry," in violation of their right to the exclusive sale of said preparations under the name of "Wistar's Balsam of Wild Cherry," these complainants and their predecessors having built up a large and valuable trade in said preparation under said name in such territory prior to such sale by the defendants, and having acquired the right to the exclusive use of that name as a trade-mark, as well as to such sale of the preparation itself by said contract.

14 Your orators say that since the making of said contract of 1869 with said John D. Park they have expended large sums of money in increasing and promoting the sale of said balsam and advertising themselves as the sole proprietors thereof west of the ridge of the Rocky Mountains, and had built up a large and valuable trade therein throughout the entire Pacific coast, selling the same under the name of "Wistar's Balsam of Wild Cherry," and had been known as the proprietors thereof under that name, and had acquired the exclusive right to the use of such name then as a trade-mark, and had made large expenditures and investments on the faith of such stipulations on the part of the said John D. Park

that he would not interfere with their control of said market; but your orators say that the defendants and each of them, unmindful of their duty and contract in the premises, have, against the equity and right of the complainants, during and for the ten (10) years last past, sold and caused to be sold, and now are selling and causing to be sold in said territory said balsam, manufactured by them, and have sold and are selling the same to be resold therein with full knowledge or reason to know that the same was or is to be so resold.

15 And further they say that the defendants have been and are, directly or indirectly, and knowingly, concerned in promoting such sale therein in competition with these complainants, and at a lower price than seven dollars ($7.00) per dozen nett, and under the name of "Wistar's Balsam of Wild Cherry," whereby in many instances purchasers are led to believe that they are dealing in the manufacture of these complainants.

That by reason of said acts of the defendants the complainants' trade in said territory has been and is being greatly damaged and interfered with, and that unless the said acts are restrained, as well as the aforesaid interference with their business east of the Alleghany, their trade and business in each of said sections of territory will be permanently destroyed and rendered valueless, and they will suffer irreparable injury.

And forasmuch as your orators can have no adequate relief at law nor otherwise than in this court, the defendants having refused and neglected upon request to discontinue said acts, and to the end that said complainants may have that relief which they can only obtain in a court of equity, and that the said defendants may, to the best and utmost of their respective knowledge, remem-

16 brance, information, and belief, but not upon oath, full, true, direct, and complete answers make in the premises, and to the interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectfully requested to answer:

1. Whether they or either of them have, within the ten years last past, sold or caused to be sold or had knowledge or reason know when selling that the same was to be resold, a preparation known as Wistar's Balsam of Wild Cherry, in the territory east of the Alleghany Mountains, above set forth, as in a contract between Lewis Williams and Isaac Butts.

2. What amount thereof, if any, they or either of them have so sold or caused to be sold or known to be resold, and when and for what price it was sold, in said territory.

3. What amount, if any, and for what price, they or either of them have so sold or caused to be sold or known the resale of, in said territory, within ten years, of the preparation above described, or a preparation of the same name or of substantially the same ingredients, and to whom.

4. Whether they or either of them have aided or abetted or promoted, directly or indirectly, such sale or resale in said territory.

17 5. Whether they or either of them have within the ten years last past sold or caused to be sold said balsam anywhere at a less price than seven dollars ($7.00) per dozen.

6. Whether they or either of them have sold, or caused to be sold, or sold with knowledge or reason to know that the same was to be resold, during the ten years last past, in the territory west of the ridge of the Rocky Mountains, a preparation known as "Wistar's Balsam of Wild Cherry," or substantially of the same ingredients, under the same name; and, if so, in what amounts, to whom, when, and at what price.

7. Whether they or either of them have aided or abetted, directly or indirectly, such sales or resales in said territory within said time.

8. Whether within the past ten years they or either of them have sold or caused to be sold, or sold with knowledge or reason to know that the same was to be resold to or sent to Redington & Co., at San Francisco, California, what is known as Wistar's Balsam of Wild Cherry.

9. Whether within the past ten years they or either of them have sold, caused to be sold, or sold with knowledge or reason to know that the same was to be resold or sent to Crane and Bingham,
18 of San Francisco, California, any of said balsam.

10. Whether within ten years last past they or either of them have sold, caused to be sold, or sold with knowledge or reason to know that the same was to be resold or sent to Kirk, Geary & Co., of Sacramento, California, any of said balsam.

11. Whether within ten years last past they or either of them have sold or caused to be sold to S. N. Smith and Co., of Dayton, Ohio, any of said balsam with knowledge or reason to know that the same was for a market west of the Rocky Mountains.

12. Whether they or either of them have within said period sold or caused to be sold to J. N. Harris and Co., of Cincinnati, Ohio, any of said balsam with knowledge or reason to know that the same was to be shipped to a point west of the Rocky Mountains.

13. Whether they or either of them have within said period sold or caused to be sold to the parties named in interrogatories Nos. 11 and 12 any of said balsam with knowledge or reason to know that they were supplying the market west of the Rocky Mountains.

And your orators pray that the defendants may be required
19 to account for all of said balsam, if any, they or either of them have sold or caused to be sold or which has been resold, they having knowledge or reason to know that it was to be resold, either in the territory west of the ridge of the Rocky Mountains or east of the Alleghany Mountains, accounting for each separately, giving the dates of such sales and the profits realized thereon; and that the defendants may be decreed to pay the complainants what upon the taking of such account may be found due them for their losses and damages in the premises; and that they and each of them may be restrained and enjoined, both provisionally and perpetually, from manufacturing, selling, or causing to be sold, and from selling with knowledge or reason to know that the same is to be resold, said

And afterward, to wit, on the 5th day of May, in the year last aforesaid, the appearance of solicitors for defendants was filed herein, clothed in the following words and figures, to wit:

Appearance of Solicitors for Respondents.

United States Circuit Court, Southern District of Ohio.

SETH A. FOWLE & HORACE S. FOWLE
against
JNO. D. PARKS, AMBRO R. PARKS, & GODFREY F. PARKS.

The clerk of the above court will please enter the appearance of the said defendants to bill and furnish us a copy.

O'HARA & BRYAN,
For Defendants.

And afterwards, to wit, on the 2nd day of June, in the year last aforesaid, came the said defendants, by their said solicitors, and filed in the clerk's office of the court aforesaid in this *court* their
25 certain answer and cross-bill, clothed in the words and figures as follows, to wit:

26 *Answer and Cross-Bill.*

United States Circuit Court, Southern District of Ohio.

SETH A. FOWLE and HORACE S. FOWLE, Complainants,
against
JNO. D. PARK, AMBRO R. PARK, and GODFREY F. PARK, Defendants.

The defendants, Jno. D. Park, Ambro R. Park, and Godfrey F. Park, saving the right hereafter to except to the many inaccurate *instruments* and false charges contained in the complainants' bill of complaint herein, for defense thereto, answering, say that it is true that the said Lewis Williams, of the city of Philadelphia, prepared, invented, and compounded the said medicinal preparation and adopted therefor the name of "Wistar's Balsam of Wild Cherry," and that the same is a useful and valuable medicine for certain complaints, and that said Williams was the sole possessor of the knowledge and nature of the ingredients thereof, and the sole proprietor of the right to manufacture and sell the same.

It is also true that at or about the time stated by the com-
27 plainants the said — sold and assigned to the said Isaac Butts, late of New York, the said rights to manufacture and sell the same in the territory stated in the complainants' bill.

It is also true that the said Butts, at or about the time stated, transfer- said right so acquired by him to the said Seth A. Fowle, of the city of Boston, and it may be true that the complainants have acquired the same right within said territory in the manner stated in the bill.

It is also true that one of the conditions and terms of the sale of said right by said Butts to said Fowle was that the latter should not

sell said balsam for a less sum or price than seven and $\frac{20}{100}$ dollars ($7\frac{20}{100}$) per dozen, or permit or cause it to be so sold, except in case of sales to agent or agents for a whole State or Territory; but in all such cases such agent or agents should not sell the same for less than the above-named rate.

It is also true that the said Lewis Williams did sell and transfer to the said Sanford and Park, of the city of Cincinnati, Ohio, his, the said Williams', exclusive right to manufacture and sell said preparation within the States and parts of States named in the bill; but it is not true that said sale and transfer was, after the sale from said Butts to Seth W. Fowle, for they say the said sale of
28 Williams to Sanford and Park was made on the 1st day of May, 1844, whereas the said sale from Butts to said Fowle was made, as charged in the bill, on or about the first day of March, 1845.

It is true that the defendant, John D. Park, is the same Park of the firm of Sanford and Park, the vendors of said Lewis Williams aforesaid, and that we afterwards purchased the interest of *of* said Sanford to said right so acquired by them from said Williams, and thereby became the sole proprietors thereof, and that the other defendants herein hold the interests they have in said right from and under the said John D. Park. It is also true that one of the terms and conditions of the sale of said right by said Williams to said Sanford and Park was and is that they should not sell said "balsam" for less than $7.00 per dozen nett; and they, the said Sanford and Park, agreed in said contract of purchase from said Williams that they would not sell or cause to be sold said balsam in any part of the territory included in the said sale to said Butts thereafter made and the same now claimed by the complainants in their bill.

29 It may be true that in 1864 the said Seth W. Fowle and the defendants, Jno. D. Park, did enter into an agreement, as stated by the complainants, whereby the said Park excluded himself from the right, title, interest, and claim in and to the property or proprietary right or franchise of, in, and to the said medicinal preparation in all that part of North America lying west of the ridge of the Rocky Mountains, embracing the States and Territories and counties named in complainants' bill, but of this the defendants cannot state particularly, because they say that the said *argument* is in writing, and the same was retained by said Seth W. Fowle, and is now, as they suppose and believe, in the possession of the complainants, and they have no copy thereof and the terms of said *argument* are not named, and they pray that they may not be required either to admit or deny that allegation of complainants' bill until the said writing is produced by the complainant-.

These defendants deny that they have, during and for the last ten years, or for any period of time whatever, sold or caused to be sold, or sold with knowledge or reason to know that the same was to be resold, said balsam, in said territory comprised in the said
30 transfer to said Isaac Butts, in large or small quantities, or in any quantity, under the name of "Wistar's Balsam of Wild Cherry" or any other name.

They deny that they or either of them have sold or caused to be sold said balsam, within said territory or elsewhere, at a less rate than ($7.00) seven dollars per dozen, at any time, under the name of "Wistar's Balsam of Wild Cherry" or under any other name.

They say they have no knowledge, and are therefore unable to admit or deny, what sum or how much money the complainants may have expended, nor what amount or value of trade or business they have established in the sale of said balsam since the year 1869 within the territory or counties west of the ridge of the Rocky Mountains, along the Pacific coast, upon the faith of the alleged contract with the said Jno. D. Park, but they deny that they or either of them have, during the past ten years or at any time, sold or caused to be sold or are now selling or causing to be sold said balsam within said territory manufactured by themselves or by any one, and they deny that they have sold or are selling the same to be resold within said territory with full or any knowledge or
31 reason to know that the same was or is to be so resold, and they deny that they have been or are, directly or in directly or knowingly, concerned in promoting such sales at a lower price than ($7.00) seven dollars or at any price per dozen, nett, under the name of "Wistar's Balsam of Wild Cherry" or under any other name.

In answer to the interrogatories mentioned—

1. *One* propounded to them by the complainants, the defendants and each of them answer, No.

2. In answer to the second interrogatory, the defendants and each of them answer, None.

3. In answer to the third interrogatory, the defendants and each of them answer, None.

4. In answer to the fourth interrogatory, the defendants and each of them answer, No.

5. In answer to the fifth interrogatory, the defendants and each of them answer, No.

6. In answer to the sixth interrogatory, the defendants and each of them answer, No.

7. In answer to the seventh interrogatory, the defendants and each of them answer, No.

32 8. In answer to the eighth interrogatory, the defendants and each of them answer, No.

9. In answer to the ninth interrogatory, the defendants and each of them answer, No.

10. In answer to the tenth interrogatory, the defendants and each of them answer, No.

11. In answer to the eleventh interrogatory, the defendants and each of them answer, No.

12. In answer to the twelfth interrogatory, the defendants and each of them answer, No.

13. In answer to the thirteenth interrogatory, the defendants and each of them answer, No.

And the defendants, having fully answered all the matters and things in the complainants' bill contained which it is material for them to answer unto, pray that the court shall say whatever they

shall be required further to answer or be required to account to and with the complainants by reason of the matters and things in the complainants' bill alleged against them; and now the defendants, by way of cross-bill against complainants, aver and charge that they, the defendants, by reason of and in virtue of the sale and transfer
by the said Lewis Williams to the said Sanford and Park
33 and the succession thereto, by the defendants, as averred in
the complainants' bill, of the exclusive right to manufacture and sell said preparation known as "Wistar's Balsam of Wild Cherry" in those certain parts of the United States lying west of the territory included in the sale and transfer from said Williams to Isaac Butts, and from Butts to Seth W. Fowle, and now claimed by the complainants, as set out in their bill, are the sole owners and proprietors of the said exclusive right to manufacture and sell said medicine within said territory, to wit, the States of Ohio, Indiana, Illinois, Kentucky, Tennessee, Missouri, Michigan, Arkansas, Mississippi, Alabama, Louisiana, and all the territory lying west of these States, together with the counties of Ohio, Marshall, Preston, Randolph, Pocahontas, Greenbrier, Monroe, Giles, Tazewell, Russell, Scott, and all the counties that lie west of those in the State of Virginia, and also the counties of Patten, McKean, Clearfield, Centre, Huntingdon, Bedford, and all the counties that lie west of them in the State of Pennsylvania, which said contract between said Williams and Sanford & Park, whereby said sale
and transfer was made in writing, signed and sealed
34 by said Lewis Williams and by said Sandford, *alias* Benj.
F. Sandford, and by said Park, *alias* Jno. D. Park, being dated on the 1st day of May, 1844, a copy of which is filed herewith, and the original will be produced, if required, as Exhibit "A," and the same is prayed to be taken as a part of this cross-bill; and *this* defendants say that all the covenants and agreements in said contract made and agreed to be kept by the said Sandford and Park have been fully performed and kept and maintained by said Sandford and Park, and these defendants are their successors.

They say that in the sale of said right to manufacture and sell said medicine *to* the — Williams to said Butts, to wit, on the 20th day of May, 1844, the said Williams divested himself *with* all propsietary claims on the formula or recipe for the manufacture of said medicine and vested the same in said Butts, in like manner, by the contract made on or about the first of March, 1845, — conveyed all his interest therein to the said Seth W. Fowle, and all the interest owned, held, and claimed by the complainants is just such, and no more, than was acquired by said Seth W. Fowle from said Butts by the
contract aforesaid; and they say by that contract there was
35 and is an express stipulation that neither the said Seth W.
Fowle nor his successors or assigns shall sell said medicine for less than ($7.20) seven dollars and twenty cents per dozen; and these defendants say that the last-named stipulation in said contract is a prohibition upon the complainants from selling said medicine for a less price than $7.20 per dozen, and inures to the benefit of these defendants, who are the sole proprietors of the knowledge of

said recipe or formula, and the right to manufacture said medicine according thereto in all other parts of the United States and its Territories than those named in the contract between said Williams and said Butts; and these defendants say that, although no size package of said medicine was presented or stipulated for in any of said contracts, they say that at the date of said contract from said Butts to Fowle the said medicine was invariably put up in packages for sale containing about eight liquid ounces, and such was the size of packages which were intended in said contract to be put up and sold by the said Fowle, under the authority of said contract, at $7.20 per dozen, yet they say that the said complainants have heretofore, within the last five years, and are still con-
36 tinuing to put up said medicine in smaller packages and selling the same at one-half or less than one-half the said sum of $7.20, as stipulated for in said contract, and by reason of said practice of the said complainants their said medicines are sought for by dealers doing business and selling said medicine within the said territory of which the defendants have the exclusive right, and they do buy and resell the same within said territory, to the great injury and diminution of the trade and business of these defendants in the manufacture and sale of the said medicine and to their damage $10,000.

And the defendants pray that the complainants, severally, may be required to answer each and *many* of the allegations of this cross-bill, to which they are hereby severally made defendants, a*ll* though said allegations were again repeated by way of special interrogatory; and, on final hearing, the defendants pray that the said complainants may be enjoined from putting up for sale said medicine in packages of less contents than those in use at the time said contract was made between said Isaac Butts and Seth W. Fowle, to wit, on the 1st day of March, 1845, and from selling packages of said
37 medicine, of whatever quantity, at a less price than $7.20 per dozen; and they further pray that the said complainants may be required to render and pay unto these defendants the damages sustained by them as aforesaid by reason of breach of the condition of said contract as aforesaid in selling said medicine at less than the stipulated price per dozen.

And, as in duty bound, will ever pray.

O'HARA & BRYAN,
For Defendants.

The defendants, Jno. D. Park, Ambro R. Park, and Godfrey F. Park, being duly sworn, on their oaths say that the statements contained in the foregoing answers to the complainants' bill and interrogatories and cross-bill are true, so far as made from their own knowledge, respectively, *are true*, and, so far as made on information, they believe them to be true.

JOHN D. PARK.
G. F. PARK.
A. R. PARK.

Sworn to before me by the said defendants, Jno. D. Park, Ambro R. Park, and Godfrey F. Park, this second day of June, 1884.

[SEAL.] HENRY HOOPER,
U. S. Commissioner, S. D. O.

38 And afterward, to wit, on the 2d day of September, in the year last aforesaid, came the defendants aforesaid, by their said solicitors, and filed in the clerk's office of the court aforesaid in this cause their certain motion, clothed in the following words and figures, to wit:

39 *Motion.*

United States Circuit Court, Southern District of Ohio.

SETH W. FOWLES & SONS, Complainants,
vs.
JOHN D. PARK & SON, Defendants.

Motion by defendants to have answer taken as sufficient and for a decree on cross-bill.

The defendants, John D. Park & Son, come and move the court that their answer filed herein on 2 June, 1884, be taken as sufficient and the plaintiffs' bill be dismissed, the said answer having been neither excepted to nor replied to by complainants.

And the defendants move the court for a decree upon their cross-bill filed herein 2 June, 1884, the same not having been demurred to, excepted to, nor answered by complainants.

JOHN D. PARK & SONS,
By O'HARA & BRYAN,
Their Solicitors.

40 And afterwards, to wit, on the 12th day of September, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause in the following words and figures, to wit:

Journal Entry V, 476.

SETH W. FOWLE & SONS
vs.
JOHN D. PARK & SONS. } In Equity.

Entry granting time for complainants to plead.

Upon application therefor, the complainants are hereby given twenty days from the date of this entry within which to plead to the answer and cross-bill filed herein.

And afterward, to wit, on the 13th day of September, in the year last aforesaid, came the said respondents, by their said solicitors, and filed in the clerk's office of the court aforesaid in this cause their certain Exhibit "A" to their said answer and cross-bill heretofore filed herein, and which said Exhibit "A" is clothed in the words and figures following, to wit:

41 Copy.

Exhibit "A" to Answer & Cross-Bill.

This agreement, made at the city of Cincinnati, State of Ohio, this first day of May, A. D. one thousand eight hundred and forty-four, between Lewis Williams, of the city of Philadelphia, State of Pennsylvania, and Benjamin F. Sanford and John D. Park, of the city of Cincinnati, trading under the firm — of Sanford and Park, sheweth the said Williams, the senior and principle partner of the firm of William & Co., of Philadelphia, is the proprietor of a medicinal preparation called and known by the name of Wistar's Balsam of Wild Cherry, the manner of preparing which medicine is considered by these parties a secret of much value; and this agreement witnesseth:

That the said Lewis Williams, for and in consideration of the promises and covenants hereinafter mentioned on the part of the said Sanford and Park, the said Lewis Williams has sold, delivered, and transferred to the said Sanford and Park a true copy of the recipe used in preparing said Balsam of Wild Cherry, together with the sole right to manufacture and sell said medicine in the States of Ohio, Indiana, Illinois, Kentucky, Tennessee, Missouri, Michigan, Arkansas, Mississippi, Alabama, Louisiana, and all the territories lying west of these States, together with the counties of
42 Ohio, Marshall, Preston, Randolph, Pocahontas, Greenbrier, Monroe, Giles, Tazewell, Russell, Scott, and all counties that lie west of these in the State of Virginia, and also the counties of Potter, McKean, Clearfield, Central, Huntingdon, Bedford, and all counties that lie west of these in the State of Pennsylvania; and the said Sanford and Park, for and in consideration of the right to manufacture and sell said medicine in the terrritory above specified, hereby covenant, promise, and agree to and with the said Lewis Williams that they, the said Benjamin F. Sanford and John D. Park, will well and truly pay to the said Lewis Williams the sum of two thousand and five hundred dollars, lawful money of the United States, in such sums as shall be hereafter specified; and they, the said Sanford and Park, also promise and agree to pay to the said Lewis Williams, without abatement, deduction, or defalcation, all such sums of money as shall be due at the time this agreement is signed for said medicine consigned to them for sale by Williams & Co., their agents, to wit, the sum of four thousand seven hundred and sixty-four dollars, this and the two thousand five hundred dollars above mentioned to be paid in such proportions as will make an average payment of not less than four hundred dollars in each and
43 every month from and after the first day of July, one thousand eight hundred and forty-four; the whole amount, seven thousand two hundred and sixty-four dollars, to be paid in full by the first day of October, one thousand eight hundred and forty-five.

And the said Sanford and Park further promise, covenant, and agree that they will not sell or cause to be sold or establish agencies for the sale of said balsam in any part of the United States, except in the States and Territories herein granted to them, and also that

they, the said Sanford and Park, will not sell or cause any of said medicine to be sold at less price than seven dollars for each and every dozen, except to such persons as shall become their agents for a whole State or Territory, and in all cases where such agencies are granted they also promise and agree to take from such agents an agreement with a sufficient guarantee or penalty that no sales of said medicine shall be made at a less price than that above named. For and in consideration of the faithful performance of the covenants and promises herein made by the said Sanford and Park the said Lewis Williams covenants, promises, and agrees that from and after the signing of this agreement by the said Lewis Williams — will not manufacture, sell, or cause to be sold any of said medicines
44 within the territory herein granted to the said Sanford and Park, or any medicines under a different name, prepared from the same recipe used in preparing said balsam, or in any other form purporting to be an improvement on the said medicine; and will also defend them against all other claimants to the right of manufacturing said medicine, securing to them as far as possible all the profits that may arise from the sale of the same in their territories: Provided always, That the said Sanford and Park shall not make known to any other person the ingredients employed or manner of preparing said medicines. It is also agreed by the said Sanford and Park that if there shall be any breach of this agreement by a failure on their part to pay to the said Lewis Williams the sum or sums of money herein specified within the time mentioned in this agreement the right of said Sanford and Park — manufacture and sell said balsam of wild cherry shall then cease and determine, and the right of said Lewis Williams to manufacture and sell the said medicine in all the States and Territories granted to them shall be the same as if this agreement had never been executed.

Copy.

LEWIS WILLIAMS. [SEAL.]
BENJ. F. SANFORD. [SEAL.]
JOHN D. PARK. [SEAL.]

Signed, sealed, delivered in presence of—
JOHN A. WISENGAN.
WILLIAM W. BLACK.

45 And afterward, to wit, on the 2d day of October, in the year last aforesaid, came the said complainants, by their said solicitors, and filed in the clerk's office of the court aforesaid in this cause their certain replication to the answer of respondents and answer to their said cross-bill, clothed in the words and figures following, to wit:

46 *Replication to Answer and Answer to Cross-Bill.*

In the Circuit Court of the United States for the Southern District of Ohio.

SETH A. FOWLE and HORACE S. FOWLE, Partners as Seth W. Fowle & Sons,

vs.

JOHN D. PARK, AMBRO R. PARK, and GODFREY F. PARK, Partners as John D. Park & Sons.

Replication to answer and answer to cross-bill of the defendants.

These repliants, the complainants herein, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiences of the said answer, for replication thereunto say that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by these repliants, without, this that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver and prove as this honor-
47 able court shall direct, and humbly pray as in and by their said bill they have already prayed.

And, now, coming to answer the cross-bill of the defendants herein, the complainants above named, saving to themselves the right to except or take advantage of errors, uncertainties, and false statements in said cross-bill contained, for answer thereto, or so much thereof as these complainants are advised it is material to make answer to say that it is not true that by virtue of the transfer referred to in said cross-bill, as dated 1st day of May, 1844, and by succession thereto or otherwise, the defendants have the exclusive right to manufacture and sell the preparation known as Wistar's Balsam of Wild Cherry in all the territory of the United States lying west of the territory included in the sale and transfer from one Williams to Isaac Butts and by said Butts to Seth W. Fowle, as set forth in complainants' bill. On the contrary, they say that the defendants have no right whatsoever to manufacture or sell said preparation in any of the territories of the United States west of the ridge of the Rocky Mountains; and they deny that these defendants and Sanford and Park have kept and maintained all the covenants and agree-
48 ments contained in said contract of May 1, 1844; and further they deny that they, these complainants, have no interest in or right to the manufacture of said preparation, except such as was derived from Seth W. Fowle through said Butts.

They say it is true that in the contract between the said Butts and the said Seth W. Fowle there was a stipulation that neither he (said Fowle) nor his successors or assigns should sell said medicine known as Wistar's Balsam of Wild Cherry for a less price than $7.20 per dozen, but they deny the averment that this stipu-

lation enures to the benefit of these defendants, or that they are the sole proprietors of the knowledge of the recipe and formula for the manufacture of said medicine in all parts of the United States and its territories, except those named in the contract between said Williams and Butts.

And these complainants say that it is true that no size of package was specifically stipulated for in said contract between the said Fowle and Butts, but they deny that at the date thereof said medicine was invariably put up in packages for sale containing about eight liquid ounces. On the contrary, they say that they were then so put up in packages of ten liquid ounces, and that the ob-

49 ject and purpose of said stipulation and its true construction, meaning, and provision was that said medicine should not be sold at a lower proportional rate than $7.20 for ten ounces thereof; and they say that they have never sold any thereof at a less proportional rate than $7.20 per dozen of 10 ounces. They admit that for ten years last past they have used a smaller trial size of bottle which holds only four liquid ounces, the lowest nett price charged for which has been $3.60 per dozen, or at the rate of $9.00 per dozen bottles of ten liquid ounces each; that no sales thereof have ever been made by them within the territory embraced within said contract between said Williams and said Sandford and Park, and that such sales as have been made were made after full notice to these defendants, with description and sample of bottle submitted to them and without any objection thereto on their part.

They deny that by reason of said sales the said medicine as put up by the complainants is sought for or has been sought for within the territory where the defendants have the exclusive right to sell, and they deny that the same has been sold therein to the injury of the defendants in the sum of $10,000, or in any sum or to any extent whatever.

50 And these complainants deny all and every other matter and thing in said cross-bill material or necessary to make answer to and not sufficiently answered, confessed, or denied herein, and pray that the court shall say whether they shall further answer or be required to account by reason of the matters and things alleged, and that said cross-bill may be dismissed at the defendants' costs.

SETH A. FOWLE.
HORACE S. FOWLE.

McGUFFY & MORRILL,
Solicitors for Complainants.

STATE OF MASSACHUSETTS, } ss:
Suffolk County, }

On this 29th day of September, 1881, before me personally appeared Seth A. Fowle and Horace S. Fowle and each for himself made oath that he has read the foregoing replication and answer by him subscribed and knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are therein stated to be on his information and belief, if any, and that as to such matters he believes them to be true.

51 In witness whereof I have hereunto set my hand and official seal, at Boston, this 29th day of September, A. D. 1884, as I am a commissioner of the State of Ohio to take acknowledgement of deeds, affidavits, &c., residing in Boston.

SAMUEL JENNISON,
A Commissioner of the State of Ohio in Boston.

[Samuel Jennison, Commissioner of Deeds for the State of Ohio, Boston, Massachusetts.]
[Sam'l Jennison, Attorney-at-Law, Commissioner for all the States, and Notary Public, 186 Washington Street, Boston.]

52 And afterward, to wit, on the 24th day of October, in the year last aforesaid, came the respondents aforesaid, by their said solicitors, and filed in the clerk's office of the court aforesaid in this cause their certain replication to the answer of complainants to the cross-bill of respondents, heretofore filed herein, and which said replication so filed is clothed in the following words and figures, to wit:

53 *Replication to Answer to Cross-Bill.*

United States Circuit Court, Southern District of Ohio.

SETH A. FOWLE & HORACE S. FOWLE
against
JOHN D. PARK & SON.

The defendants, who are complainants in the cross-bill herein, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the complainants' answer to the said cross-bill, for replication thereto say that they will aver and prove their said cross-bill to be true, certain, and sufficient, and that the said answer of the said complainants is uncertain, untrue, and insufficient; all which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and they pray as in their said cross-bill.

O'HARA & BRYAN,
For Defendants.

54 And afterward, to wit, on the 25th day of October, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause, clothed in the words and figures as follows, to wit:

Journal Entry V, 508.

SETH A. FOWLE & HORACE S. FOWLE, Partners as Seth W. Fowle & Sons,
vs.
JOHN D. PARK, AMBRO R. PARK, & GODFREY F. PARK. } In Equity.

On motion to the court by counsel for complainants, and it being shown to the court that complainants desire that the evidence to be

adduced in the above-entitled cause be taken orally, and that they desire to take testimony in the city of New York, the court appoint John H. Parsons, Esquire, of the city of New York, an examiner to take testimony in said cause, under the sixty-seventh rule of practice for the courts of equity of the United States, as amended at December term, 1861, of the Supreme Court of the United States.

And afterward, to wit, on the 6th day of November, in the year last aforesaid, there was issued out of the clerk's office of the court aforesaid in this cause a certain commission to said John H.
55 Parsons, Esquire, of the city of New York, an examiner, clothed in the following words and figures, to wit:

Commission to John H. Parsons, Esq., as Examiner.

THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Western Division, }

The President of the United States of America to John H. Parsons, Esq., of the city of New York, Greeting:

Know ye that we, in confidence of your prudence and fidelity, have appointed you examiner, and by these presents do give you full power and authority diligently to examine, upon corporal oaths or affirmations before you to be taken, as witness or witnesses on the part of the complainants in a certain cause now pending, undetermined, in the circuit court of the United States of America for the southern district of Ohio and western division thereof, wherein S. W. Fowle & Sons are complainants and John D. Park *et al.* defendants, touching the premises.

And we do further empower you to examine, on the same behalf and in like manner, any other person or persons who may be produced as witnesses before you; and we do hereby require you, before whom such testimony may be taken, to reduce the same to writing and to close it up, under your hand and seal, directed to
56 William R. Howard, clerk of the circuit court of the United States for the western division of the southern district of Ohio, Cincinnati, Ohio, and that you return the same, when executed as above directed, annexed to this writ, with the title of the cause indorsed on the envelope of the commission, into the said circuit court, before the judge thereof, with all convenient speed.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this sixth day of November, A. D. 1884, and in the 109th year of the Independence of the United States of America.

Attest:

[L. S.] WM. C. HOWARD, *Clerk*,
By R. C. GEORGI, *Deputy*.

And afterward, to wit, on the 15th day of December, in the year last aforesaid, came the said the complainants, by their said solicitors, and filed in the clerk's office of the court aforesaid in this cause certain depositions heretofore on their behalf taken, clothed in the following words and figures, to wit:

57 *Complainants' Testimony. Depositions of John H. Francis and Others.*

Depositions of sundry witnesses taken before me, John H. Parsons, an examiner appointed under the commission issued out of the circuit court of the United States for the southern district of Ohio, western division, dated the 6th day of November, 1884, and hereto annexed, taken at the city of New York, county of New York, and State of New York, pursuant to said commission and notice, and at the time and place therein specified in said notice, to be read in evidence on behalf of the complainants in an action pending in said court, wherein Seth A. Fowle and Horace S. Fowle, as partners as Seth W. Fowle and Sons, are complainants, and John D. Park, Ambro R. Park, and Godfrey F. Park, partners as John D. Park and Sons, are defendants.

NEW YORK, *December* 2, 1884.

Present: R. T. B. Easton, Esq., attorney for complainant; Marcus P. Bestow, Esq., attorney for all the defendants.

58 JOHN H. FRANCIS, of lawful age, being by me first duly cautioned and solem-ly sworn, deposes and says as follows:

Examination by Mr. EASTON:

Q. What is your age, Mr. Francis?
A. Forty-one years old.
Q. Where is your residence?
A. Brooklyn.
Q. What street?
A. No. 217 St. John's Place, Brooklyn.
Q. What is your occupation?
A. Dealer in medicines.
Q. Where?
A. No. 70 Maiden Lane, New York.
Q. How long has that been your occupation?
A. Since I first went into business. I suppose it is about twenty years ago. I went in as a boy.
Q. You are in business for yourself?
A. At present, yes, sir.
Q. How long have you been in business for yourself?
A. About six or seven years; I guess seven or eight years.
Q. Where were you before that?
A. I was employed by John F. Henry, Curran and Company.
Q. Where?
A. They were at Nos. 8 and 9 College Place.
Q. City of New York?
A. Yes, sir.
Q. What was the nature of your employment?
59 A. When I left there I was buyer for the house.
Q. And before that what was your occupation?

A. I had done corresponding. I had also done book-keeping. I had done pretty nearly everything in the store, off and on. I was there about fifteen years, I guess.

Q. In what year did you leave there?

A. I think in 1876.

Q. And what year did you become buyer for the house?

A. In this interim I was out of the house for about three months; then I came back.

Q. In what year?

A. I was trying to think. I think that was in 1872. I think I came back then as buyer or took position as buyer; that would make three years I was buyer, if not longer.

Q. Do you know the plaintiffs in this action?

A. I am acquainted with Mr. Fowle. I am acquainted with two of the plaintiffs; but this gentlemen (indicating Mr. Seth A. Fowle) I know better than the other.

Q. Are you acquainted with the defendants, John D. Park & Son?

—. I met Mr. Park but once, and I met his sons once; but I do not think that I should know them if I should see them; it was a good many years ago. I know them in business, but not
60 personally.

Q. What do you know of them in their business?

A. I know they were dealers in medicine.

Q. What kind of medicine?

A. What we call patent medicines—proprietary medicines.

Q. Did you know whether they sold the same kind of article as the plaintiffs?

A. Repeat that.

Q. Did you know whether they sold the same kind of article as the plaintiffs—some of them?

A. Well, the plaintiffs made and controlled an article, while they were general dealers.

Q. What article was that?

A. Wuster's Balsam of Wild Cherry.

Q. Of what?

A. Wirster's Balsam of Wild Cherry.

Q. Do you know whether or not the defendants dealt in that article?

A. I know they made Wister's Balsam, but supposed it to be different from this; it was specified in the trade as different.

Q. As what?

A. This was called Wister's Balsam Butts, and that made by Parks—that was called Wister's Balsam Park.

Q. Do you know whether the plaintiffs' Wester's Balsam was kept in stock by John F. Henry, Curran and Company?

61 A. Yes, sir.

Q. Was the Parks' Balsam of Wild Cherry kept in stock there?

A. Off and on. I do not think it was kept as fully as the other.

Q. Did you see any invoices of John D. Park and Company; are you acquainted with their style of bills or invoices?

A. It is a long while since I seen one of them, still I might recognize it if I should see it.

Q. Do you recognize the two that I produced—one dated August 19, 1875, and the other October 26, 1874; have you ever seen them before?

A. Well, I think I have, from a mark I see on them.

Q. What mark do you see on them?

A. I see my initials on them checking them up.

Q. What are they?

A. J. H. F.

Q. Did you place it on each of them?

A. Yes, sir.

Q. When were they placed on those bills?

A. Well, I should say anywheres from ten days after the day that the bills were received; they were checked probably seven or ten days after the bills came in.

By Mr. BESTOW:

Q. Do you remember anything about it at all?

62 A. Well, I could not tell the date I put my signature on those bills.

By Mr. EASTON, resuming:

Q. How near the dates of them could you say it was that you put your initials on those bills?

A. Well, it is a matter of conjecture; the goods might have been in there a week or two weeks before the bills came to me to have initials on them.

Q. Were they put on in the course of your employment there?

A. No doubt.

Mr. BESTOW: I move to strike that out; we want memory—absolute knowledge in regard to the initials.

Q. We want to know how your initials came to be placed on those?

A. As the person that checked up the bills checked them up with my initials and passed them on to Henry's desk, and usually he passed them all through and gave them to the book-keeper; that was the routine of the bills in the store.

Mr. BESTOW: We simply want your memory in regard to those two bills.

A. Well, I could say that, taking the general routine, I think those bills went through and were marked in the way I stated before.

(Counsel for defendant moved to strike out the last answer
63 of the witness as being conjecture and not an answer to any question.)

Counsel for complainant withdraws the question.

Q. What were you required to do, in the course of your employ-

ment, as to checking the bills and goods referred to in those bills, and how did you show that you had done it?

A. By putting my name on.

Q. What were you required to do?

A. Check them up that the price was correct. I did not check the goods as received; that I know nothing about. I simply checked them as to their price.

Q. Have you had any access to these invoices since you left the employment of Mr. Henry?

A. No, sir.

Q. Have you any remembrance as to any of the marks or figures or words on those invoices, aside from your initials?

A. I see that the receiving clerk's name is on them—the person who received them—and Mr. Curran's name is on one of them also—both of them, in fact.

By Mr. BESTOW:

Q. Do you remember that from having seen it there before?

A. From seeing it now, I should say yes. I could not have put my name on without having seen their name as having received the goods.

64 By Mr. EASTON:

Q. In what order did your initials go upon those bills, in order of time, as to other initials and marks?

A. It came second.

Q. Who came last?

A. Mr. Curran, on these two bills.

Q. Are you acquainted with the handwriting of Mr. Curran?

A. Only from recollection now.

Q. Do you recollect that name that you see there as being his handwriting?

By Mr. BESTOW: Did you see him write it?

A. I should say I did not.

Q. That is all the recollection you have of it?

A. Yes, sir; in all probability I did not see him write it; there is only one chance of a thousand of my seeing him write it.

By Mr. EASTON:

Q. What is your recollection as to that being his handwriting?

A. I think it is; that is the most positive thing I could say as to that.

Q. Had you frequently seen Mr. Curran write?

A. I have seen him write.

Q. Seen him write his signature?

A. I wouldn't answer that question no more than that I seen it on these bills.

By Mr. BRISTOW:

Q. Not that you recollect?

65 A. No, sir; a man may know a thing and not know it; that is just the way it is.

By Mr. EASTON:

Q. Had you seen other invoices of John D. Park while you were in the employ of Henry Curran and Company?
A. I think there is no doubt of that.

By Mr. BESTOW:

Q. Do you recollect positively?
A. Well, I cannot swear positively to that, because there is a very large business and a great many bills, but there is no doubt about it.

Counsel for complainants offers in evidence bill of August 19, 1875, as Complainants' Exhibit No. 1 and bill of October 26, 1874, as Complainants' Exhibit No. 2.

Counsel for defendants objects to them as not having been proved and as immaterial evidence in this action.

Bill dated August 19, 1875, marked Complainants' Exhibit No. 1 of December 2, 1884; bill dated October 26, 1874, marked Complainants' Exhibit No. 2 of December 2, 1884.

Cross-examination by Mr. BESTOW:

Q. Have you any memory of these bills, Exhibit- 1 and 2?
A. Memory from the general appearance.
Q. Other than the general appearance?
A. No, sir.

66

CINCINNATI, *Oct.* 26, 1874.

Messrs. John F. Henry, Curran & Co., New York, bought of John D. Park, patent medicines and fancy goods, northeast cor. Fourth and Walnut St.; warehouse, Nos. 175 & 177 Sycamore St.

4 gro. Guysott's spla., 84.00	336	
8 " Wister's balsam, 84.00	672	
	1,008	
Less f'g't on shipment to N. Y., as per b. l., 2,400, @ 90c. p'r 100	21	60
	$986	40

By fr't, 21.60.

3½ gro. Guysott's } to New York.
3 " Wister's }

4½ " Wister's } to Strong Colb, Cleveland.
½ " Guysott's }

½ " Wister's " Collins Bros., St. Louis.

Curran.

[Written across the face in lead pencil:] E. J. H. F.

67 CINCINNATI, *Aug.* 19, 1875.

John F. Henry, Curran and Co., bought of John D. Park, proprietary medicines and druggists' sundries, N. E. cor. Fourth and Walnut Sts.; warehouse, 175 and 177 Sycamore St.

5 gro. Wister's Balsam, 84.00, 420.00—420.00.
Pressell.
Curran.
30 boxes; f't, 10.92.

[Written across the face in lead pencil:] E. J. H. F.

68 Q. Did you ever see these goods mentioned on these bills; have you any recollection of them?

A. I could not say that I have.

Q. It was not part of your duty to receive the goods, was it?

A. No, sir.

Q. And, in fact, you don't know that they ever came into the store?

A. I would be willing to swear that they did.

Q. Well, I am not talking about how the question strikes your mind or how you argue it out. I am talking about the absolute fact that you know.

A. I only know from the bill being checked up and given me as to goods having been received.

Q. Then you simply know by hearsay?

A. Know by being checked up.

Q. Then you don't know actually that any of those goods were ever received, do you?

A. I know nothing.

Q. I want yes or no.

A. I can say no.

Q. Have you ever been in the office of the store or business place or manufactory of John D. Park?

A. I was in their store—in their office.

Q. How do you know they manufactured Wister's Balsam of Wild Cherry?

69 Counsel for complainants objects to the question as not properly cross-examination.

A. I simply knew it by seeing their price-list.

Q. Did John F. Henry, Curran & Company, while you were with them, have a large trade?

A. Very large.

Q. Did they sell anywhere else but in New York city?

A. They sold all over the United States.

Q. Goods did go all over the United States?

A. Yes, sir.

Counsel for complainants objects to the previous question on the ground that there is no foundation laid for it; there is nothing to show that this witness has sold any of these goods.

Q. You were in the employ of John F. Henry, Curran and Company?
A. Yes, sir.
Q. For a number of years?
A. Yes, sir.
Q. Familiar with the business?
A. Yes, sir.
Q. And they sold goods, you say, all over the United States?
A. Yes, sir.

Question objected to by counsel for complainant-.

70 Q. Did they sell goods west of the Alleghany Mountains?
A. Well, my previous answer answers that.
Q. Answer it again.
A. Yes, sir; west and east and north and south.
Q. Did they sometimes get orders for Park's Wister's Balsam from the West?
A. Yes, sir.

Counsel for complainants objects as not being cross-examination.

Q. And filled them, did they?
A. Yes, sir.
Q. And sold the article known as Park's Wister's Balsam to dealers west of the Alleghanies?
A. Without doubt.
Q. When did you say you ceased to be in their employ?
A. In 1876.

Redirect examination:

Q. Have you any recollection of any specific sale of Park's Wister's Balsam anywhere?
A. No, sir.

Recross-examination:

Q. You mean you do not recollect any now?
A. I do not; it would be impossible.

JNO. H. FRANCIS.

71 JOHN F. HENRY, of lawful age, being first duly cautioned and solemnly sworn before me, deposes and says:

Examination by Mr. EASTON:

Q. What is your age, Mr. Henry?
A. Fifty years of age.
Q. Where do you reside?
A. No. 140 Second Place, Brooklyn, New York.
Q. What is your occupation, Mr. Henry?
A. I am a dealer and manufacturer in medicines.
Q. What kind of medicines?
A. Proprietary.

Q. How long has that been your occupation?
A. Thirty-three years.
Q. Are you acquainted with the plaintiffs in this action?
A. I am with one of them—Seth A. Fowle.
Q. Are you acquainted with the defendants in this action?
A. I am.
Q. Either of them?
A. Well, I am acquainted with John D. Park and two of his sons.
Q. Where have you met the defendants?
A. I have met them in Cincinnati and I have met one of his sons—I have met both of his sons elsewhere and met one of them at Long Branch once, the other once in St. Louis, but have met him more frequently in Cincinnati—in their store in Cincinnati.

72 Q. How long have you been in business in the city of New York?

A. Since the 1st of January, 1866—nineteen years the 1st of January next.
Q. Where were you in business before that?
A. Waterbury, Vermont, and Montreal, Canada.
Q. Had you met the defendants or either of them in Vermont or in Canada?
A. No, sir.
Q. Have you had business relations with the complainants?
A. Yes, sir.
Q. Have you had business relations with the defendants?
A. Yes, sir.
Q. When did those business relations with the defendants commence, and where?
A. Well, I sold John D. Park goods when I was at Waterbury, Vermont, more than twenty years ago. I sold him goods first for Demos, Barnes and Company in New York. I was out there taking some orders for Barnes and some orders for myself. In 1860 I sold Mr. Park goods, I think; that was the first transaction I ever had with him in 1860.
Q. When did they commence to sell goods to you?
A. Well, eighteen years ago.

73 Q. What goods have they sold you?

A. They have sold us Geysott's sarsaparilla, Park's Wistar's Balsam of Wild Cherry?
Q. Were you accustomed to keep in stock Park's Wistar's Balsam of Wild Cherry?
A. Yes, sir.
Q. How lately have you had it in stock?
A. I do not think I have bought any of them for five or six years.
Q. I place before you four invoices: Plaintiffs' Exhibits 1 & 2, and invoice of John D. Park and Sons, July 12, 1876, and an invoice of John D. Park & Sons, Sept. 25, 1876, and I ask you if you recognize them?

Mr. BESTOW: You mean by that if he has personal recollections of them, do you? I object to the question unless put in that form—the form of personal recollection.

A. I recognize the invoices as being invoices that came to my firm from John D. Park and John D. Park & Sons.

Q. How much have you been accustomed to seeing the bills or invoices of John D. Park & Sons?

A. Oh, I saw nearly all the invoices that ever came into the store from anybody.

Q. How did they come to you?

A. In the first place, I opened the mail and took the invoices.

74 Q. What did you do?

A. I opened the mail and took the invoices, and Park's invoices were generally handed to the receiving clerk, and the others too; and then he checked them up.

Mr. BESTOW: Wait a minute, Mr. Henry; he asked you what you did.

Q. When did you see them again?

A. Before they were handed to the book-keeper to be entered they were always put on my desk.

Q. What was done with them then?

A. They were handed to the book-keepers to be entered on the books of the firm.

Counsel for defendants objects to all this testimony as irrelevant and as testifying to business done by other people.

Q. Did you see them after that?

A. No; not generally.

Q. Have these bills been paid?

Objected to by counsel for defendant.

A. Yes, sir.

Q. Do you recognize any of the marks on the invoice of July 12, 1876, and on that of September 25, 1876?

A. I recognize the checks—the name of Mr. Pressell.

75 CINCINNATI, *July 12th*, 1876.

Jno. F. Henry, Curran & Co. bought of John D. Park & Sons, proprietary medicines and druggists' sundries, N. E. cor. Fourth & Walnut Sts.; warehouse, 175 and 177 Sycamore St.

2 doz. # $2\frac{7}{12}$ doz. Crook's poke root, $6.67		17 23
$\frac{1}{2}$ ex. $\frac{10}{12}$ " yellow dock, 7.00		5 84
$\frac{1}{12}$ broken, 2 " wine of tar, 6.75		13 50
$5\frac{7}{12}$ " Wistar's balsam, 6.67	Pressell.	37 24
$\frac{1}{4}$ gro. Gray's oint. med., 32.40		8 10
$5\frac{1}{2}$ doz. Fowle's Wistar's balsam, 7		38 50
3 " 4-c. stamps		1 44
		$121 85
Case & costs		1 50
		$123 35

9 boxes, — ft.; 1 cartage; $7\frac{1}{2}$ doz. short.

[Written across the face in lead pencil:] E. C. E. P.

76 CINCINNATI, *Sept.* 25, 1876.

Messrs. John F. Curran & Co. bought of John D. Park and Sons, proprietary medicines and druggists' sundries, N. E. cor. Fourth and Walnut Sts.; warehouse, 175 & 177 Sycamore St.

3.	5 gro. Gray's oin't seal, 16.50	Pressell.	82 50
# 1	" " " med		33 00
# 76	" Hardy's eye balsam, 13		2 17
			$117 67
	5 gro. Wistar's balsam, 84		420 00
	Less freight, 1,200 lbs., @ 75c.		9 00
			$411 00

33c. ft., 960; 2 cartages.

[Written across the face in lead pencil:] E.

Mr. BESTOW: Will you just bear in mind the same thing I told Mr. Francis. We simply want your memory and what you
77 know. We do not want you to recognize the signature because you see it there. We do not want anyrhing taken for granted.

WITNESS: I recognize the name of Mr. Curran.

Q. On what bill?

A. July 12th you ask me about; you specified this bill; I recognize the initial C. E. P.—Charles E. Parker.

Q. Now, that of September 25, 1876?

A. I recognize Mr. Pressell's name. I recognize another name, but am not sure on that part of it. I am not familiar enough with it to know if that is his handwriting.

Q. Is there anything covered up there? Do you see any other initials there?

A. Nothing that I can be sure about on that but Mr. Pressell's name.

Q. What was he employed to do—Mr. Pressell?

A. Receive goods.

Q. What was Mr. Parker employed to do?

A. Buy and sell goods.

Q. What has become of Mr. Parker?

A. He is dead.

Counsel for complainant- offers in evidence invoice of July 12, 1876, as Plaintiffs' Exhibit No. 3, and the invoice of September 25, 1876, as Plaintiffs' Exhibit No. 4.

Defendants' counsel objects on the ground that it is irrele-
78 vant and immaterial, and as not proven.

Invoice of July 12, 1876, marked Complainants' Exhibit 3, December 2, 1884; invoice of September 25th, marked Complainants' Exhibit 4, of December 2, 1884.

Q. I offer you a postal card and ask you if you recognize the handwriting on it?

A. I do; it is the handwriting of Mr. B. S. Barrett.

Q. Who was Mr. B. S. Barrett?

Mr. BESTOW: I object to that. That is not the way to prove a handwriting. In the first place, we are entitled to the best evidence, and in the next place, if you do not do that, I shall want to know what Mr. Henry knows about Mr. Barrett's handwriting. I move to strike out the last answer.

Counsel for complainant- withdraws the question.

Q. Did you know Mr. B. S. Barrett?

A. Yes, sir; I did.

Q. When and where did you know him?

A. Do you want me to go back to when I first knew him?

Q. Well, if not too long.

A. Well, away back in 1854 I knew him in Madrid, St. Lawrence county, New York, and in my store, in Montreal. He com-
79 menced to work for me in 1860, and he came to New York about seventeen years ago. He has been with me ever since, except until within the last year or so, I think, he has been out. He was a partner of mine in Montreal, and had been a clerk of our firm in New York. He was clerk and partner in Montreal, and then clerk in our firm in New York. I have known him since 1854.

Q. What was the nature of his employment by you in New York?

A. Well, most of the time he was corresponding clerk; he has sold goods and ranked as one of our head clerks.

Q. How close were his relations to you in business?

A. He is a confidential man; he was sort of a confidential clerk.

Q. For how long a period?

A. Oh, I might say for fifteen years.

Q. When did it end?

A. About a year ago.

Q. When did it commence?

A. Well, it really commenced in Montreal, for he had charge of my store there while he was clerk; in fact, since it has been longer than fifteen years—all the time he has been with me he has been a confidential man.

Q. You are acquainted with his handwriting?

A. Very familiar with it.

80 Q. Please state whether that is his handwriting on the postal card which I have produced?

Mr. BESTOW: I object to that. I would like to ask Mr. Henry where Mr. Barrett is now?

A. He is travelling for Reed and Conrick.

Q. Is he in the city of New York?

A. He is travelling for them. I do not know whether he is in the city now; he is away most of the time. I do not think he is in the city of New York now—that is, I have not seen him.

Mr. BESTOW: I do not see any reason why you should not produce the original. I do not see why you should prove a thing of that kind by somebody else when the original is here and can be had; therefore I object to it.

Counsel for complainant says that that is assuming too much.

WITNESS: This is the handwriting of Mr. B. S. Barrett.

Q. From whom did he receive instructions in regard to the correspondence of the house?

A. Generally from the partners; more generally from myself.

Q. What was the nature of his business habits as to correctness and carefulness?

A. He was very correct and very careful.

Q. Did he have authority from the firm to sign the firm name?

A. He did.

81 Q. Mr. Henry, can you, from an inspection of that postal card, recollect as to the facts that are contained in it?

Mr. BESTOW: I object to that question. If you want to prove his recollection to said facts you must question him in regard to the facts.

WITNESS: Well, as I understand it, this card is to refresh my memory as to the facts.

Mr. EASTON: Yes, sir.

Mr. BESTOW: That is the part that I object to.

WITNESS: I know that his first expression, "Will do best we can to protect your territory." I know there was a general feeling in the store to do everything to protect Mr. Fowle's territory. Mr. Fowle sometimes complained that we sold Park's Wistar's Balsam east of the Alleghany Mountains. We used to reply to them that we could not always help ourselves; that parties ordered it to go back, west of the Alleghany Mountains—specially ordered Parks.

Mr. EASTON: That is not responsive to the question. I asked you in regard to east of the Alleghany Mountains.

Mr. BESTOW: I ask that the answer be taken as given.

82 Q. If you have any other recollection as to any of the facts stated on that card please give it to us.

A. You may ask as to specific points if you want to.

Q. I prefer to let that stand on the question as to your having any other recollection of the facts.

A. I can go into a long explanation, which involves the whole business, but I don't imagine that either party want that I should do that

Q. Please give us the facts, if any, in regard to sales by you of Park's Wistar's Balsam on territory east of the Alleghany Mountains.

Objected to by counsel for defendant as assuming that he has made them, which is not fair to the witness and which is not a thing that has been stated or proved.

A. We sometimes sold the goods east of the Alleghany Mountains.

Q. Please give us any specific cases of such sales.

A. In looking over the books to-day I find one——

Mr. BESTOW: Wait a minute. If you are going to testify from the books I want the books.

WITNESS: We did make sales east of the Alleghany Mountains.

Mr. BESTOW: I object to that, and shall ask to have the
83 books brought here if he is going to testify from the books.

WITNESS: Shall I answer this?

Mr. EASTON: Yes, sir.

WITNESS: On March 23, 1875, we sold Wells and Elliott, then doing business in this city, a one-sixth of a dozen of Park's Wistar's Balsam.

Q. Do you recollect any other cases?

A. I cannot specify any other cases, but there were some.

Mr. BESTOW: If you cannot specify them do not answer; that is simply no answer to his question.

WITNESS: I simply know in a general way.

Q. What can you tell me about the stamp on this postal card that I have produced to you before?

A. It is our stamp—John F. Henry, Curran and Company.

Q. What is the date there?

A. March 25, 1874.

Q. Can you recollect any such sales on eastern territory about that time or before that time?

A. We were in the habit now and then of selling to the wholesale druggists in New York—such as W. H. Schefflein and Company, but not very frequently—not to a large amount.

Q. Can you specify any other firms besides W. H. Schefflein and Company?

84 A. No; I can only say in a general way that we sold a few of the wholesale houses in New York—very few and very small quantities.

Mr. HENRY:

Q. Do you recognize this pamphlet or book that I produce to you?

A. I recognize it as one that I published and sent to the drug trade about the year 1875.

Q. You say, "I published it;" what do you mean?

A. Well, I mean that my clerk and myself—I mean that our firm sent this out to the drug trade; we compiled it; we got up the matter and corrected it and had it printed, and we sent a great many of them away.

Q. What do you call it?

A. We call it a price-list.

Q. What do you read on the first page of it—on the title page?

Mr. BESTOW: If you are not going to offer the book in evidence I object to it as a matter entirely irrelevant and having nothing to

do with this case—Mr. John F. Henry's price-list or whatever it may be; and if you are going to offer it in evidence, then the fact will appear in the evidence itself.

85 A. I read "Catalogue with prices of proprietary medicines and drugs, pharmaceutical preparations, mineral waters, and druggists' fancy goods of American and European production;" and then in a sort of card in the middle, "Annual, 1875, John F. Henry, Curran & Co., 8 & 9 College Place, New York."

Q. What is the character of page 14 of that catalogue?

A. Page 14 enumerates some of the balsams we kept and sold.

Mr. BESTOW: I make the same objections to that as I did before. You must either put the book in evidence or else we do not want anything to do with it. We certainly do not want the witness here to read from the book as testimony.

Q. Does it specify the balsam of the defendants?

A. Yes, sir.

Q. Please read what it specifies.

Objected to by counsel for the defendants on the ground that the book must either be put in evidence or the substance of it must be left out.

The witness is neither testifying from his knowledge or recollection; simply reading from the book.

86 A. Well, this book reads, "Wistar's Balsam, Park's; retail price, $1.00; the dozen price, $7.75." You asked for the defendants; I do not read anything more.

Cross-examination by Mr. BESTOW:

Q. Mr. Henry, do you find on that page anything in regard to the plaintiffs' article, "Wistar's Balsam," on the same page?

A. I do.

Q. Will you read it?

A. Wistar's Balsam, Butts', see index in parenthesis; retail price, 50c., four dollars a dozen. Wistar's Balsam, Butts'; retail, one dollar; $7.75 per dozen.

Q. Will you turn to the index which it refers to there?

A. It simply refers to that advertisement on page 15.

Q. Look on page 15 and tell me if that is the advertisement of the plaintiffs in that publication.

A. It is.

Q. What was advertised?

A. Dr. Wistar's Balsam.

Q. Of Wild Cherry?

A. Dr. Wistar's Balsam of Wild Cherry.

Q. Will you read the price of it?

Mr. EASTON: I object and call for the reading of the whole advertisement.

87 A. Price, large size, ten ounce, $1.00 per bottle, 8.00 per dozen; small size, four ounce, 50c. per bottle, $4.00 per dozen. That is all.

Q. Now, is that the same article referred to on the other page as being Wistar's Balsam, Butts'?

A. Yes, sir.

Q. Both of them are the plaintiffs' article?

A. That is the same thing.

Q. Did you keep on hand and for sale an article known as Wistar's Balsam, and put up by the plaintiffs and sold for $4.00 per dozen?

A. We kept on hand the article known as Wistar's Balsam, Butts', and may have sold for $4 per dozen.

Q. I mean to say that article there?

A. We did.

Q. You sometimes sold it for less than four dollars, did you?

A. We sometimes did, probably.

Q. Did you retail it at 50c. per bottle?

A. We sometimes accommodated a customer in the store, but if we did retail it it was at fifty cents.

Q. At what price did you sell the article marked one dollar—retail price—the plaintiffs' article?

A. We generally sold it for $7.75; sometimes we may have gotten $8.00.

Q. Did you sometimes get less than $7.75?

A. I do not remember that we did.

Q. Were you general dealers in what are known as patent medicines or proprietary medicines?

A. We were.

88 Q. Where were your sales made?

A. More largely in the United States and Territories; more or less in foreign lands—South America, Australia.

Q. Did you sell largely in the Western country as well as in the Eastern of the United States?

A. We did.

Q. Did you sell Park's Wistar's Balsam in the Western country?

Objected to by counsel for complainant as not being properly cross-examination.

A. We did.

Q. Didn't you sell what you did sell of it almost entirely west of the Alleghany Mountains?

A. We sold it more largely west of the Alleghany Mountains than east.

Q. Than anywhere else?

A. Yes, sir.

Q. Wasn't that the object of your purchasing Park's Wistar's Balsam—to supply your Western trade?

Objected to by counsel for complainant as being incompetent.

A. It was the main object.

Q. Was Park's Wistar's Balsam advertised or steps taken to create any sale for it in the East?

A. No, sir; not to my knowledge.

89 Q. Doesn't this postal card about which you have testified, and which is signed J. F. H. & Co.—was it not intended to show to the plaintiff, Mr. Seth A. Fowle, of Boston, that it was not your intention to sell any of Park's Wistar's Balsam on his territory?

Question objected to by counsel for complainant- on the ground that it is incompetent, and that the postal card is the best evidence itself as to that.

A. Our object was to show him that, so far as we consistently could, we protected his territory.

Q. What do you mean by "protected his territory?"

A. That we did not sell Park's article on his territory very frequently.

Q. Then you knew of the division of territory between the respective parties to this suit?

A. In a general way; yes, sir.

Q. In regard to the sale of this medicine?

A. Yes, sir; I had heard of the contract. As a large medicine dealer I had always heard there was a contract between them.

Answer objected to by counsel for complainant- as being hearsay.

Q. You had tried to live up to that contract or help them to carry the contract out, had you?

90 Objected to by counsel for complainant- as being incompetent.

A. As far as we consistently could, as general dealers, and fill our orders.

Q. Were the defendants, John D. Park & Sons, cognizant of the fact that you occasionally sold, as you say, a small quantity, a sixth of a dozen, of their medicine on the plaintiffs' territory?

Question objected to by counsel for complainant- unless witness testifies from his own knowledge.

A. They knew that we sometimes sold goods, sold Park's Wistar's Balsam, on eastern territory.

Q. When you made these sales was it done with any knowledge or connivance on the part of John D. Park and Sons?

A. He didn't see the orders that we took for Park's Wistar's Balsam east of the Alleghany Mountains, if you want to specify that territory.

Q. Had he known that you received such orders could he have prevented your filling them?

Question objected to by counsel for complainant- on the ground that it is incompetent, and that it is argumentative.

91 A. I don't think he could, except by refusing to sell east of the Alleghany Mountains.

Q. If you had any of Park's Wistar's Balsam in stock, he could

not prevent you from selling it east of the Alleghany Mountains, could he?

Objected to by counsel for complainant- as incompetent and argumentative.

A. No, sir.

Q. You say that you sold defendants' article in small quantities to a very few of the wholesale dealers. Was it not generally for the purpose of filling Western orders?

A. I think it was, generally.

Question and answer objected to by complainants' counsel on the same grounds as in the preceding objection.

Q. Were the plaintiffs aware that you kept the defendants' article, known by you as Park's Wistar's Balsam of Wild Cherry, for sale among your stock?

A. I think they were.

Q. Was there any letters received by you from the plaintiffs or either of them prior to March 25, 1874, of which this postal card is the answer?

A. I think so.

Q. Would you have probably instructed the sending of such a letter as this except in answer to a letter received by you?

92 Objected to by counsel for complainant- as being incompetent and argumentative.

A. No, sir.

Q. Do you know where the letter is to which this postal card is the answer?

A. It may be preserved, but probably not; it is so long ago.

Q. Wasn't a letter complaining of your sales of Park's medicines on the plaintiffs' territory?

A. I think it was.

Q. How long prior to that time had the plaintiffs or either of them known that you kept Park's medicines in stock and for sale?

A. I cannot say.

Q. Well, so far as you know, was it some years prior?

A. I think they had some knowledge or suspicion of it several years prior.

Answer objected to by counsel for complainant- as being incompetent.

Q. Now, will you read that postal card?

A. The card is addressed to Seth W. Fowle, Boston, Mass.

Q. Where is it postmarked?

A. New York, March 25th. It reads, "Will do best we can to protect your territory, but, as we sell to the "whole world," it is a very difficult thing to keep track of things of this kind,
93 and rather delicate, besides, to tell a customer what he must have when he thinks he knows himself best.

"Yours, J. F. H., H. C. & CO.

"Per B."

The stamp on it is John F. Henry, Curran & Co., New York, and, inside of it, March 25th, 1874.

Q. What does J. F. H., C. & Co. stand for?

A. John F. Henry, Curran & Company.

Q. Was that sent to the party to whom it is addressed—the plaintiff?

A. It has the stamp of the U. S. post office on it to show that it did.

Redirect examination by Mr. EASTON:

Q. Mr. Henry, are you acquainted with the size of these bottles, Butts' Balsam of Wild Cherry?

A. Not very much; the large size I am more familiar with than I am with the small size; I have handled the large size a great many times.

Q. How many liquid ounces would they contain—the large size?

A. That made by Butts—well, my judgment would be, from measuring that bottle with my eye, about twelve ounces; of course, I am familiar with the business; I used to be a retail druggist.

94 Q. Is the small size half or less than half or more than half of the large-size bottle?

A. Well, I should think it was half or a little less than half.

Q. Will you please fill out your testimony on your cross-examination where you gave the prices per bottle, and give the sizes of the large and small bottle as there set down?

A. The large bottle, ten ounces, one dollar per bottle, $8.00 per dozen; small size, four ounces, 50c. per bottle.

Q. Who constituted the firm of John F. Henry, Curran & Co.?

A. John F. Henry, Theodore Curran, Henry E. Bowen, and Charles A. Gillis, special partner.

Recross-examination:

Q. Do you know when the plaintiffs first put up this small-size bottle you testified about?

A. At first they did not put it up, but in or about the year 1872 they did.

JOHN F. HENRY.

The further taking of testimony in this matter is, by agreement of parties, adjourned until December 3rd, 1884, at 11 a. m.

95 NEW YORK, *Dec. 3rd*, 1884.

Present: Parties as before.

FREDERICK M. ROBINSON, of lawful age, being by me first duly cautioned and sworn, deposes and says:

Examination by Mr. EASTON:

Q. What is your age, Mr. Robinson?

A. Forty-five years.

Q. Where is your residence?
A. New York city.
Q. What part of New York city?
A. 15th street—357 W. 15th St.
Q. What is your occupation?
A. Druggist.
Q. What kind of drugs do you deal in?
A. All kinds.
Q. How long has that been your occupation?
A. Twenty-five years, more or less.
Q. Are you a member of a firm?
A. Yes, sir; R. W. Robinson & Sons.
Q. Do you know the plaintiffs in this action, Seth W. Fowle & Sons'?
A. Yes, sir.
Q. Do you know the defendants, John D. Park and Sons?
A. Only by reputation.
Q. What, if any, transactions have you had in Park's Wistar's Balsam of Wild Cherry?

96 Objected to by defendants' counsel as being immaterial, irrelevant, and as not connecting the defendant in any manner with the transactions, and as calling for things outside of his connection with the defendant.

A. In January, 1880, I believe I had made one sale of a quarter of a dozen.
Q. Who was the sale made to?
A. Made to E. Barnes, of Tarrytown, New York.
Q. If you know his occupation please state it.
A. Druggist.
Q. Of what kind?
A. Retail druggist.
Q. Do you know from whom you purchased that?
A. I do not.

Cross-examination by Mr. BESTOW:

Q. Did you say you sold that to E. Barnes, of Tarrytown?
A. Yes, sir.
Q. At what price?
A. I do not know; I don't remember; I don't remember what I paid for it.

FRED. M. ROBINSON.

Recess until 1.30 p. m.

97 After recess.

JAMES HIGGINS, of lawful age, being by me first duly cautioned and solemnly sworn, deposes and says:

Examination by Mr. EASTON:

Q. What is your age, Mr. Higgins?
A. 35 years—going on thirty-six.

Q. Where is your residence?
A. 117th street, Harlem—No. 176.
Q. What is your occupation?
A. I am receiving clerk for C. M. Crittenden — Company.
Q. What does C. M. Crittenden do?
A. Patent-medicine dealer.
Q. How long have you been his receiving clerk?
A. About sixteen years, I believe; fifteen or sixteen years.
Q. Are you acquainted with the plaintiffs in this action, Fowle and Sons? Are you acquainted with Mr. Seth A. Fowle, who is here?
A. I do not know as I have seen the gentleman. Personally, I am not acquainted with him myself. The firm have dealings with him.
Q. Are you acquainted with the defendants, John D. Park & Son?
A. No, sir.
Q. What are your duties as receiving clerk?
98 A. I check all bills for goods that come in and receive them.
Q. Please tell me if you recognize this bill of July 19th, 1880, that I produce.

Mr. BESTOW: What do you mean by recognize? Let us have it a little plainer. Do you mean ever having seen it before?

A. Yes, sir; that is my check-mark.

Mr. BESTOW: Wait a minute. That is not the question. Do you recognize ever having seen that bill before?
A. Yes, sir.

By Mr. EASTON:

Q. What do you recognize on it?
A. When the goods came in; this here (indicating) is my check-mark, "Jas."
Q. Does that stand for your name?
A. Yes, sir.
Q. Please tell me if you recognize any other marks on that bill?
A. No, sir; that is all I remember. The other marks are probably done in the office or somewhere after it leaves my hands. All I recognize about it as my checking.
Q. Do you recollect anything about that bill independently of your signature there?
A. No, sir.
Q. When was your signature attached to that bill or written on it?
99 A. Well, I suppose ——

Mr. BESTOW: Don't suppose—give your memory.

A. Well, as I remember, it was when these goods were received.
Q. What is your custom as to checking goods and bills?

Mr. BESTOW: I object to that; we do not want the custom; we simply want the facts.

Question withdrawn.

Q. What is required of you in your employment?

Objected to by defendants' counsel as irrelevant.

A. The bills, of course, came to me when the goods were received to be checked. That is a regular system of ours.

Plaintiffs' counsel offers in evidence bill of July 19th, 1880, as Plaintiffs' Exhibit No. 5.

Objected to as irrelevant and as not proved.

Bill marked Plaintiffs' Ex. No. 5, December 3rd, 1884.

Cross-examination by Mr. BESTOW:

Q. Mr. Higgins, have you any recollection of this bill or of these goods, except from having seen it on this paper—any personal recollection of these goods or this bill—of these special goods?

100

CINCINNATI, *July 19th*, 1880.

John D. Park, Ambro D. Park, Godfrey F. Park.

Mr. C. N. Crittenton, New York, bought of John D. Park & Sons, proprietary medicines, 175, 177, and 179 Sycamore street.

½ gro.	Guysott's spla., 87	43	50
⅙ "	Wistar's Balsam, 87	14	50
¼ "	Crumpton's S., 36	9	00
2 "	Dixon's cam'r, 18	$36	00
		103	00

Jas.

Less f'ht, 440 @ 105. $103.00.

[Written across the face in lead pencil:] C. E. P.

101

A. Well, that I decline to answer.

Q. Yes or no, I want.

A. Well, I did not understand this thing. I have been notified to come around to you. I did not know I was to be asked these questions.

Mr. EASTON: If you have no recollection of it you must so state.

Mr. BESTOW: That is what I want to know—if you have any distinct recollection.

A. Well, these goods, you see, they are goods that are not sold much.

Counsel for complainant moves to strike the answer out.

Counsel for defendants objects to its being stricken out.

Q. What I want to know is simply whether you remember anything about this bill, aside from seeing it?

A. I don't think so.

Q. Do you remember anything about those goods, aside from seeing this bill to-day?

A. Well, I could not remember. I think I seen the bill, and I know I must have had the goods corresponding.

Q. Where does Mr. Crittenden sell goods?

A. Of course, all over the country. He is a wholesale jobber, you know.

102 Q. All over the United States—east, west, north, and south?

A. Yes, sir.

Q. Does he sell this Wistar's Balsam mentioned on this bill to his western customers?

Objected to by counsel for complainants as incompetent.

A. I could not answer the question. Of course, my place is simply receiving the goods, and where they go to I do not know.

Redirect examination:

Q. Do you remember to have seen Park's Wistar's Balsam at any time or anywhere?

A. In the building?

Q. Anywhere?

A. No, sir; as far as our stock is concerned, I do not have anything to do with it after receiving the goods; my place is separate.

By Mr. BESTOW:

Q. You don't remember to have seen it?

A. No, sir; my place is separate from the others.

JAMES HIGGINS.

103 ISAAC SHERWOOD COFFIN, of lawful age, being by me first duly cautioned, and having affirmed, deposes and says:

Examination by Mr. EASTON:

Q. What is your age, Mr. Coffin?

A. Forty-two.

Q. Where is your residence?

A. 30 South Oxford street, Brooklyn.

Q. What is your occupation?

A. Wholesale druggist.

Q. How long has that been your occupation?

A. In the neighborhood of twenty-two years.

Q. What is the name of your firm?

A. Coffin, Redington & Co., in New York, and Redington & Co., in San Francisco.

Q. Who composes the firm in New York?

A. It is all one firm.

Q. Who composes the firm?

A. John H. Redington, Christian W. Smith, William P. Redington, I. S. Coffin, Andrew G. Coffin as special partner.

Q. How long have you been a member of that firm?

A. For the firm, under different styles, for sixteen years. It has been one business, but the copartnership has been different.

Q. What branch of the business do you take care of?

104 A. Chiefly purchasing and shipping to San Francisco.

Q. Where do you make your sales?

A. I do not make any sales.

Q. Where are the sales of your house made?

Objected to by defendants' counsel on the ground that he is the Eastern resident New York buyer for the house, and has nothing whatever to do with the sales personally.

Q. Have you got a partnership agreement?

A. Yes, sir.

Q. Have you got it with you?

A. No, sir.

Q. Where do- your house make their sales?

Objected to as before.

A. Chiefly on the Pacific coast.

Q. Where else?

A. I was going to say I would amend my answer made a moment ago. We do sell some few goods here.

Q. Anywhere else?

A. Well, we sell some goods in Mexico, and Sandwich Islands, and places of that kind.

Q. Canada?

A. No, sir.

Q. Do you sell between the Alleghany Mountains and the Rocky Mountains?

Objected to as before.

A. From here; yes, sir.

Q. How much?

105 A. I could not answer; not large. I would also say that they are goods that are not irrelevant to this matter.

Q. What kind of goods are they?

A. Borax chiefly; some California herbs.

Q. Do you know the plaintiffs in this suit, Seth W. Fowle & Son?

A. I do.

Q. How long have you known them?

A. Well, about the time I have been in business.

Q. How did your acquaintance commence?

A. We used to handle their Wistar's Balsam on the Pacific coast.

Q. When did you commence to handle their Wistar's Balsam on the Pacific coast?

A. Before I was connected with our business, if I remember correctly.

Q. Where does your knowledge of that commence—how long ago?

A. I could not fix a positive date.

Q. About what time?

A. I have a recollection of having handled Wistar's Balsam from about the time that I was in business.
Q. When did it cease?
A. It never has ceased.
Q. Are you acquainted with the defendants, John D. Park and Sons?
A. I know John D. Park and Sons.
Q. Do you know either of the firm personally?
106 A. I would say not. I have seen John D. Park. I do not think I would recognize him to-day.
Q. Have you purchased goods of that house?
A. I have purchased goods of that house.
Q. Have you purchased Park's Wistar's Balsam of them?
A. I have not.
Q. Not at any time?
A. I could not answer that before I was a member of that firm.

By Mr. BESTOW:

Q. You have not since you have been in business?
A. I have no recollection of having purchased any of Park's Wistar's Balsam.

By Mr. EASTON:

Q. Have you purchased Park's Wistar's Balsam of any one?

Objected to by defendants' counsel as irrelevant and entirely immaterial, so far as this matter is concerned.

A. Yes, sir.
Q. Of whom have you purchased it?

Objected to as before.

A. I purchased it of S. N. Smith & Co.
Q. Any one else?
A. I believe not.
Q. What is the business of S. N. Smith and Co.?
A. I believe they are wholesale druggists.
Q. Where do they carry it on?
107 A. At Dayton, Ohio.
Q. For how long a period have you bought Park's Wistar's Balsam of them?
A. Seven years.
Q. Commencing when?
A. 1877.
Q. When was the last transaction?
A. 1883.
Q. Can you give the month and day?
A. I think it was in December, 1883.
Q. Where were those goods delivered?
A. In Dayton, Ohio.
Q. With what directions from you?

Objected to on the ground that that is a private matter with the witness, and counsel for the defendants advises the witness that he is not obliged to answer the question.

The examiner directs the witness to answer the question.

A. With directions to ship the goods to San Francisco.

Q. Can you give me the aggregate transactions in Park's Wistar's Balsam during the last seven years, or about?

A. The amount of balsam or the number of transactions?

Q. The number of transactions.

Objected to as before.

A. Well, now, in regard to this matter, I prefer to stand
108 entirely independent in this matter. I will answer any question that I am directed to answer, but I do not want to be in the position of deciding the matter myself and apparently taking either side, and I would rather have the examiner direct me, if there is any question, whether it should be answered or not.

Mr. BESTOW: That is all right; he has ruled against you.

A. I believe, ten.

Q. Please give us the highest and the lowest price that you paid for Park's Wistar's Balsam.

Objected to by counsel for defendants.

A. $87.00 and $84.00 a gross.

Q. Is $84.00 the lowest price you have paid in any case?

A. $84.00 is the lowest price that we have paid. There has been a freight allowance.

Q. In how many cases?

A. I believe in all the cases freight has been allowed.

Q. Freight from where and to where?

A. The freight from Dayton to San Francisco.

Q. Were your goods shipped from Dayton—these goods, Park's Wistar's Balsam—to San Francisco by express or freight?

A. Freight.

Q. And by what line?

109 Mr. BESTOW: Only state from your personal knowledge.

A. Well, I could not answer that in a moment.

Q. Not in any case?

A. Well, the goods go over several roads, you know.

Mr. BESTOW: Don't explain, please; just answer the question.

Cross-examination by Mr. BESTOW:

Q. Do you sell any of Park's Wistar's Balsam upon territory east of the Alleghany Mountains?

A. I never sold any of Park's Wistar's Balsam.

Q. Never sold any at all?

A. No, sir; if you mean me individually.

Q. You have not bought any from Smith and Co. since 1883?

Mr. BESTOW: Mr. Referee, I move to strike out all that testimony as immaterial and irrelevant to the issue concerned.

ISAAC SHERWOOD COFFIN.

Adjourned by agreement of parties to December 5th, 1884, at 11 a. m.

NEW YORK, *December 5th*, 1884.

Met pursuant to adjournment.

Present: Mr. Bestow, on behalf of defendants.

" " Fowle, one of the plaintiffs.

110 Mr. Fowle asks for an adjournment, stating that Mr. Easton was unable to be present, owing to illness.

By agreement of parties the further hearing in the matter was adjourned to Thursday, December 11th, at 2 p. m.

NEW YORK, *Dec. 11th*, 1884.

Met pursuant to adjournment.

Present: Mr. Bestow, for defendants.

" Easton for complainants.

Mr. Easton stated that the testimony was closed on behalf of complainant-.

No further evidence was offered on behalf of either party.

J. H. PARSONS, *Examiner.*

111 I, John H. Parsons, the examiner appointed under the annexed commission, do hereby certify that John H. Francis, John F. Henry, Frederick M. Robinson, and James Higgins were by me first severally sworn, and Isaac Sherwood Coffin was by me first duly affirmed, to testify to the truth, the whole truth, and nothing but the truth; that the depositions by them respectively subscribed as above set forth were reduced to writing by John F. Devlin, a stenographer, who is not interested in the suit, in my presence, in the presence of all the witnesses, respectively, and were respectively subscribed by the said witnesses in my presence, and were taken at the time and place in the notice specified, and were continued from day to day as above set forth, except as otherwise noted, which adjournments were by agreement of the counsel of the respective parties as above set forth; that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof I have set my hand and official seal this 13th day of December, A. D. 1884, at the city of New York.

[Seal of J. H. Parsons, Exam'r.]

JOHN H. PARSONS, *Examiner.*

Fees, $37.00.

Paid by counsel for complainant.

JOHN H. PARSONS, *Examiner.*

112 And afterward, to wit, on the 28th day of January, in the year of our Lord one thousand eight hundred and eighty-five, came the said complainants herein, by their said solicitors, and filed in the clerk's office of the court aforesaid in this cause certain depositions theretofore taken on their behalf, and clothed in the following words and figures, to wit:

113 *Complainants' Testimony. Deposition of S. N. Smith.*

STATE OF OHIO, }
Hamilton County, } ss:

Case No. 3624, Pending in Circuit Court of the U. S., Southern District of Ohio. In Equity.

SETH A. FOWLE and HORACE S. FOWLE, Partners as Seth W. Fowle and Sons, Complainants,

vs.

JOHN D. PARK, AMBRO R. PARK and GODFREY F. PARK, Partners as John D. Park & Sons, Defendants.

The above-named defendants will take notice that on Thursday, the 22nd day of January, A. D. 1885, the complainants above named will take the depositions of sundry witnesses, to be used as evidence in the trial of the above cause, at the office of Young and Young, attorneys-at-law, in the city of Dayton, in the county of Montgomery, in the State of Ohio, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

Service of the above notice is acknowledged and proof of the official character of the officer before whom the said depositions may be taken is, by agreement, waived; also all exceptions as to time.

114 Done this 16th day of January, 1885.

O'HARA & BRYAN,
Attorneys for Defendants.
McGUFFEY AND MORRILL.
Attorneys for Complainants.

115 Depositions of sundry witnesses, taken before me, George R. Young, a notary public, within and for the county of Montgomery, in the State of Ohio, pursuant to the annexed notice and at the time and place therein specified, to be read in evidence on behalf of the complainants in an action pending in the circuit court of the United States for the southern district of Ohio (in equity), in which Seth A. Fowle and Horace S. Fowle, partners as Seth W. Fowle and Sons, are complainants, and John D. Park, Ambro R. Park and Godfrey F. Park, partners as John D. Park and Sons, are defendants, Henry A. Morrill, Esq., of the firm of McGuffey and Morrill, being present on behalf of complainants, and —— O'Hara, of the firm of O'Hara and Bryan, being present on behalf of defendants.

SULLIVAN N. SMITH, of lawful age, being by me first duly cautioned and sworn, deposes and saith as follows:

Ques. 1. Please state your name, age, residence, and business, and how long you have been in such business.

An. My name is Sullivan N. Smith; age, 48 years; resi-
116 dence, Dayton, Ohio, and business, proprietary medicines. I have been handling proprietary medicines for twenty-two or three years. I have been in that business in Dayton since 1873. In 1874 I bought the business.

Ques. 2. Under what name have you carried on this business at Dayton; and, if under a firm name, who constitute the firm; and give the name or names of all who are interested in the business now carried on by you in Dayton or who have been so interested?

Ans. I have carried it on under the name of S. N. Smith & Co. S. N. Smith is the only member of the firm of S. N. Smith & Co., and it is so registered. No one else is now interested in the business carried on by me. John D. Parks was a partner from 1874, the time of the purchase, until 1877, I think, when I bought him out—I mean John D. Park, of Cincinnati.

Ques. 3. What business relation, if any, did you have with John D. Park or with Sanford and Park prior to your business relations with Park, as above described?

Ans. I used to travel for John D. Park. I don't recollect the year I went to work for Mr. Park; perhaps it was about 1869 that I went to Cincinnati. Before that I was with H. Scovill, and at same time represented Fuller, Finch and Fuller, of Chicago.
117 After I worked for Park I went into business in St. Louis. I think that was in 1870. It must have been in 1868 I went to work for Park.

Ques. What interest, if any, had John D. Park in these Chicago firms you have named?

Ans. His interest was only in the Scovill firm. He was interested in that house.

Ques. What business was the Scovill firm engaged in?

Ans. They were in general patent-medicine business and also proprietors of patent medicines.

Ques. 6. State whether they dealt in an article known as "Wistar's Balsam of Wild Cherry," manufactured by said Park.

Ans. They did.

Ques. From whom did they purchase that article, so far as you know, while you were with them?

Ans. From John D. Park.

Ques. Can you state on what terms Park and Co., as the manufacturers of that article, furnished it per gross to Scovill and Co.?

Ans. No, sir; I do not know. They had a contract, but I do not know what it was. I might have known, but don't remember now.

Ques. Did they or not handle large quantities of it?

Ans. They handled considerable of it.

118 Ques. Now, generally speaking, where was their market for that article, or to what point was it shipped, as it came under your observation?

Ans. Illinois, Wisconsin, Iowa, Missouri, and don't know whether they shipped much to Kansas or not. I think it was in their territory, and Minnesota was, too.

Ques. Did you travel for them for the sale of this article; and, if so, in what region?

Ans. In the States above named. I believe, for the sale of that article, only in those States. No, I'm mistaken; I might have sold at Nebraska; anything south of that line we didn't sell in. We sold also in Missouri, I think. Mr. Park questioned whether we had a right to Missouri, but we sold there.

Ques. Did you travel at all for that firm in regions west of the Rocky Mountains?

Ans. No, sir; I did not.

Ques. Do you know of Scovill & Co. shipping any of this article to points west of the Rocky Mountains while you were with them?

Ans. I do not.

Ques. Did you have anything to do with the matter of filling orders?

Ans. No, sir; I simply travelled, soliciting orders in the
119 regions mentioned. I used to sell goods to customers at the house when at home.

Ques. 15. Fix the years, if you can, during which you were with Scovill?

Ans. I think I was connected with them during 1863, '4, '5, '6, & '7.

Ques. What years were you at St. Louis, and what were you doing?

Ans. I was in the wholesale and retail drug trade. I was there during 1871 and '2.

Ques. Did you handle "Wistar's Balsam of Wild Cherry;" and, if so, where did you get it?

Ans. I did. I used to get it of John D. Park; and, by the way, while I was in St. Louis I represented John D. Park. I used to send him orders. While I was out on the road I sold goods for him.

Ques. 18. Have you any books touching the business carried on in St. Louis, to which you have just referred, which would show what orders for this article you filled during that time, and what the article cost you and what you sold it for?

Ans. I don't think I have.

Ques. Where are your books covering that business?

Ans. Well, that business was—when I had any stock of
120 his goods there I used to keep it in a book—merely a memorandum book to keep account of the stock, and it was kept separate from the drug-house that I was connected with. When we took an invoice of stock what there was short was charged up to the firm of Raboteau & Co. (of which I was a member). It is my impression that that memorandum book was left with Mr. Park when we settled up. If I've got it I don't know it; didn't consider it of any importance, as there was a settlement in full.

Ques. 20. Where are those firm books?

Ans. I expect Mr. Raboteau has got them.

Ques. Did the firm handle this article in any other way than as you have described?

Ans. We handled it only in the way I have described. I handled

the goods for him, and whatever the shortage was charged up to us. It kept us in goods we didn't have to pay for and gave him a a stock of goods in St. Louis all the while.

Ques. At what rate per dozen, or per gross, did he furnish these goods to you and at what rates did you sell them?

Ans. He furnished them to us at his regular price, whatever that was—either $84 or $87 per gross. I think it was $84 when we were in St. Louis.

Ques. Who paid the freight?

121 Ans. I charged the freight to John D. Park. He delivered the goods; it was his stock; he paid me a salary when I sent him orders. I was a salaried man for him.

Ques. What, then, had the firm to do with this matter?

Ans. They had nothing to do with it, only we furnished him storage for the goods. We used to use right from those goods when we were short. Once every three months or so we'd take an inventory of them.

Ques. 25. Then, if I understand you, the firm dealt in these goods, taking such as it needed from the quantity you had control of as a salaried agent of John D. Park. Is that correct?

Ans. That's correct.

Ques. 26. And such as the firm used it paid or allowed $84 per gross, less freight?

Ans. I sold them to the firm myself at that. There was no deducting of freight, because I sold it to them right from the store at the schedule prices.

Ques. 27. What store?

Ans. Their own store—Raboteau & Co.'s.

Ques. 28. Didn't the firm have an account with Park & Co.?

Ans. We had a regular account when we bought goods, but not on these goods. It was John D. Park. We had an account

122 touching this article in this way: We took an inventory of this article and found how much the firm had used, and reported it to Park and he charged us with it. I suppose that's so. We treated that just as we did any other goods.

Ques. 29. Is it or not true, then, that, in effect, your firm bought this article of Park at $84 per gross, less freight, and sold it again on their own account, taking the profits, if any, themselves?

Ans. Yes.

Ques. 30. Did you or not account to the firm for the salary paid you by Park, or was that an independent matter between you and Park?

Ans. That was an independent matter. I paid a book-keeper a salary to attend to my business in the firm, because my time was taken up at other things.

Ques. 31. State whether or not John D. Park knew of the manner in which you were supplying your firm with this article & terms on which it was being supplied.

Ans. I don't know that he knew of that article, but he knew of the general goods; in fact, my settlements were not made with Park.

123 Ques. —. Didn't your firm render accounts to John D. Park from time to time touching their transaction with him, including such quantities of this article as they had used in their trade?

Ans. We rendered him accounts. If we'd used any of that it probably was in it.

Ques. 33. At what rates did your firm sell this article?

Ans. It's pretty hard to tell how a drug-house sells an article. Our price was seven $\frac{50}{100}$ dollars per dozen.

Ques. 34. When did you solicit orders for this article during this period of time that you were in St. Louis?

Ans. In Missouri, Kansas, Nebraska, Illinois, and Wisconsin.

Ques. 35. State whether or not, while you were in business at St. Louis, your firm made shipments to Sacramento or San Francisco or any point on or near the Pacific coast; and, if so, what houses did you ship to.

Ans. I have no recollection of our firm shipping to any of those points.

Ques. 36. Where, if you know, are the members of that firm or any of the shipping clerks or those who were familiar with the points to which goods were shipped by the house during that period?

Ans. Mr. Raboteau, I think, is in Fargo, Dakota Ty. The
124 shipping clerks, I don't know where they are.

Ques. 37. State whether you know of any of this article being shipped by that firm to points west of the Rocky Mountains; and, if so, to what points.

Ans. I have no recollection of any being shipped west of the Rocky Mountains by that firm.

Ques. 38. Do you know of the firm of Reddington and Co. or Crane and Bingham, of San Francisco, or of Kirk, Gary & Co., of Sacramento, California, or either of them?

Ans. I know of Reddington & Co. and have probably heard of the others, but don't recollect them.

Ques. 39. State whether or not, within the past five years, you have shipped any of Park's "Wistar's Balsam of Wild Cherry" to parties on or near the Pacific coast; or, if so, to whom, at what points, at what time or times, and by whose order.

If necessary, I would be glad to have you consult your books and invoices and any other papers or correspondence which will enable you to answer the question fully.

Ans. I've shipped goods to Reddington and Co.—I think I shipped them "Wistar's"—in fact, I know I did. There was a firm, I think, I shipped to in Sacramento. I don't remember the
125 name now. I am unable to answer the question more fully without first examining my books and papers.

(In order to afford witness opportunity to make this examination the further taking of these depositions is adjourned until Thursday, January 23d, 1885, at 9 o'clock a. m. January 22d, 1885, 6 p. m.)

JANUARY 23*d*, 1885—9 o'clock a. m.

The taking of these depositions continued pursuant to adjournment.

Ques. 40. State whether or not you have examined your books and papers since adjournment.

Ans. I have been examining my books—the accounts of these different parties.

Ques. 41. Have you or not looked at your correspondence with parties west of the Rocky Mountains during the past 6 or 8 years, so far as the same made any reference to this balsam in question, if there is any such?

Ans. I've looked over a correspondence extending for five years.

Ques. 42. Now, you may state to whom on the Pacific coast you have shipped "Wistar's Balsam of Wild Cherry" within
126 the past five years, to what points, at what times, under whose order, and at what prices.

Ans. I can tell the quantities, but can't tell you the dates. I shipped to Reddington and Co., San Francisco, and there was a firm in Sacramento—I don't remember their name—it's Hahn and Co., I believe. Those shipments were made from 1879 up to the present date. I got orders from the parties—the most of those were shipped at $87.00. It was shipped at the proprietor's quantity price—when it was $84, it was shipped at $84; when $87.00, at $87.00—whatever the proprietor's price was.

Ques. 43. Who paid the freight?

Ans. The parties I shipped to paid the freight.

Ques. 44. What, if any, allowance did you make them on the price that you have named by reason of the freight?

Ans. They deducted the freight on remitting.

Ques. 45. That is to say, they remitted you the prices you have named, less the freight paid by them?

Ans. They remitted us less certain allowances for freight. I can't say about the freight paid by them.

Ques. 46. Was there not a fixed allowance for freight agreed upon between you and them; and, if so, what was it?

127 Ans. The freight they deducted was less the rate as per bill of lading.

Ques. 47. What was the amount of freight, on the average, deducted on shipments to the parties named?

Ans. I cannot say.

Ques. 48. Have you or not books showing remittances from them in connection with these shipments which will enable you to answer my question?

Ans. I think I have.

Ques. 49. Will you examine such books at your earliest convenience and then give an answer to my question?

Ans. If you desire so.

Ques. 50. I do.

Ques. 51. Are you able to state approximately what you received, net, for the "balsam" included in these shipments referred to?

Ans. I can't answer that now.

Ques. 52. Can you do so from your books, and will you examine them for that purpose, and are your books of a kind that you can conveniently submit them to me in this office?

Ans. No, sir; they are my private books, in which my business is kept.

Ques. 53. Do you decline to allow me to examine your books, in your presence, so far as they relate to these transactions?

Ans. Not if you have a right to.

Ques. 54. I now claim that I have a right to, and ask you
128 to permit this inspection referred to, and wish to know whether you will allow it.

Ans. After you show your right. I do not say I will not, but must be convinced that you have a right.

Ques. 55. Then, I'm to understand you, am I, that you will not do so unless I show some authority other than my claim and demand to see them?

Ans. Yes, sir.

Ques. 56. Now, will you please state how many shipments of this "balsam" you have made to Reddington and Co. within the past five years, and in what quantities each?

Ans. I think there hasbeen nine gross shipped to them in five years.

Ques. 57. How many more, if any?

Ans. I think that's all, from my books, that I know of. I don't, of course, know how many some other party shipped.

Ques. 58. In how many lots have you shipped this?

Ans. I should judge in probably 6 to 9 shipments.

Ques. 59. How early did you first begin to ship this balsam to Reddington & Co.?

Ans. I don't recollect.

Ques. 60. How early did you commence to ship this balsam to Reddington & Co.?

Ans. I do not recollect.

Ques. 61. State how much, if any, you shipped them be-
129 tween the year- 1873 & 1877, inclusive. And, if you are not able to answer the question without aid of your books, will you please examine your books on that subject?

Ans. Well, I would have to examine my books.

Ques. 62. Are you able without examining your books to state whether you shipped any during that period?

Ans. I am not.

Ques. 63. How much of this balsam have you shipped within the past ten (10) years to this firm of Hahn & Co., and at what dates and in what quantities?

Ans. Never shipped them but one gross. It is within 2 or 3 years.

Ques. 64. State to what other parties on the Pacific coast or west of the Rocky Mountains you have shipped this article within the past ten years.

Ans. I have no recollection of shipping to any other parties. In

the shipments already mentioned as made to Reddington & Co. I include any which may have been made to Coffin, Reddington & Co.

Ques. 65. State whether or not you have ever shipped any to Crane and Bingham, of San Francisco.

Ans. I don't think I ever did.

Ques. 66. Have you or not had any correspondence with
130 them about selling them this article?

Ans. I have no recollection of any.

Ques. 67. State whether or not you have had any correspondence within the past ten years with Reddington & Co., whereby you made an arrangement with them to supply the market in San Francisco with this article through you, on certain terms. And, if so, where is this correspondence?

Ans. I don't think I ever had any correspondence with Reddington and Co.

Ques. 68. Do you know whether or not this article has been furnished Crane and Bingham, of San Francisco, direct by John D. Park and Sons?

Ans. I do not.

Ques. 69. Do you know anything of the firm of Langley & Michaels, of San Francisco?

Ans. No.

Ques. 70. Please state whether or not you have ever sent quotations of this article to Langley and Michaels, of San Francisco.

Ans. I don't remember that I ever have.

Ques. 71. State whether or not you have repeatedly sent quotations of this article to the Pacific coast at $87.00 per gross, freight paid?

Ans. I don't recollect of doing so.

Ques. 72. Are we not to understand by your former testimony that you have, in effect, sold it there for $87.00 and as low
131 as $84, freight paid?

Ans. Yes. At the same time I haven't quoted it to parties, that I remember.

Ques. 73. Is it or not a fact, Mr. Smith, that you have notified parties on the Pacific coast that you could furnish this article at six dollars per dozen, net?

Ans. It is not a fact.

Ques. 74. Did you or not notify them that you could do it for a fraction over six dollars; or, in other words, that you would furnish it, laid there, for a fraction over six dollars to you, net?

Ans. Oh, I never wrote any such letters, and I may add here that I don't recollect of ever having any correspondence, only with Coffin, Reddington and Co. and this Hahn.

Ques. 75. State whether or not you shipped a quantity of this article in June, 1883, to Kirk, Gary & Co., of Sacramento.

Ans. Don't think I did; haven't any such entry on my books.

Ques. 76. During the period that you were shipping this article to California did you know what "Fowle's Wistar's Balsam of Wild Cherry" was selling at in California?

Ans. I did not.

Ques. 77. Have you known its quotations—prices—on the
132 price-lists circulated in California?

Ans. I never did.

Ques. 78. When did you first learn of the contract between Park and Fowle, touching the sale of this article on the Pacific coast?

Ans. I can't recollect that.

Ques. 79. Did you or not know of it at the time Mr. Park was in partnership with you in Dayton?

Ans. I never knew it directly; only from hearsay.

Ques. 80. Did you or not say, yesterday, that while you were representing John D. Park at St. Louis you and Mr. Park had a discussion about his territory?

Ans. I think I didn't say anything about it.

Ques. 81. While you represented Park in St. Louis did you sell this article west of the Rocky Mountains?

Ans. I have no recollection of selling any there at that time.

Ques. 82. State whether or not it is a fact that you then knew that Fowle & Sons claimed the exclusive right to the territory west of the Rocky Mountains.

Ans. I don't recollect that I knew at that time.

Ques. 83. When, as near as you can state, if you are able to state, did you first learn the fact, as you now remember the matter?

Ans. I am not able to state when. I hav-n't learned the fact directly.

133 Ques. 84. Do you recall how you learned it, indirectly?

Ans. I heard of it at Mr. Park's.

Ques. 85. Now, will you please state what quantity, at what times, and to whom you have shipped this article to points east of the Alleghany Mountains within the past ten years, calling your attention particularly to the cities of New York, Philadelphia, and Richmond, and, if necessary, you can examine your books?

Ans. I have no recollection of ever shipping any east of the Alleghanies, and I know I have no such books with any such entries on.

Ques. 86. Are we to understand that you have no knowledge or recollection of any sales made by you during that period at points, or which you knew were to go to points, east of the Alleghany Mountains?

Ans. I have no recollection of making any such sales.

Ques. 87. How were you connected with John D. Park between the time you left St. Louis and the time when he became your partner in Dayton?

Ans. I left St. Louis in 1873. After I left St. Louis I continued to represent Mr. Parks until I came here, in the summer of 1873, and went in with Oliver Crook and Co. After they failed,
134 in 1874, I represented Mr. Park for several months & traveled in the West for him, and in the latter part of that year he became my partner.

Ques. 88. What did you and Mr. Parks deal in while he was your partner?

Ans. Well, we dealt in Dr. Crook's medicines and patent medicines.

Ques. 89. State what, if anything, you had to do with the matter of this "balsam" during that period.

Ans. All that I had to do with it was when I exchanged for it or bought it direct.

Ques. 90. State whether or not you and Mr. Parks as a firm dealt in this article.

Ans. No, sir.

Ques. 91. Where are your books of that firm business?

Ans. At my office.

Ques. 92. Can I examine those?

Ans. If you examined those you'd examine the others; they're all together.

Ques. 93. Please state whether you kept this article in stock or on hand while you and Mr. Parks were in business in Dayton.

Ans. Why, I had it on hand, if I'd bought any of him or exchanged. I sometimes had it on hand. We didn't keep it in stock to deal from. It was only occasionally as I'd get hold of it.

Ques. 94. When you made exchanges did you or not exchange the goods of yourself and Park, as a firm, for this balsam?

135 Ans. Well, yes; I presume it was those goods. I've had some others that I got from New York. I can't call to mind just what the article exchanged was.

Ques. 95. State whether or not the profits, if any, realized on this balsam during the time that you and Park were together were turned over to the firm.

Ans. It's in the books there. It all went in under the firm.

Ques. 96. Well, then, we are to understand, are we, that, so far as you filled orders and made sales of this balsam during that period, such business was treated as firm business and not your separate business?

Ans. That's my recollection.

Ques. 97. In what name was the business carried on?

Ans. S. N. Smith and Co.

Ques. 98. When your firm procured this article from Park and Sons during this period, did you credit them with the price of it; and, if so, at what rates was it furnished, and where are the entries of such credits to be found?

Ans. Well, when I made a purchase, as he says, "at such prices, I'll ship you down some goods," of course a credit was made to them on our books. I purchased at their regular rates. The entries are in my books.

136 Ques. 99. Will you look at those entries and bring me a memorandum of the rates at which this article was furnished S. N. Smith and Co. by Park and Sons during the period mentioned?

Ans. It isn't necessary for me to look; it's $84. I will bring you such a memorandum.

JANUARY 23D, 1885—12.30 p. m.

Recess taken until 2 o'clock p. m.

JAN'Y 23D, 1885—2 o'clock p. m.

Taking of depositions proceeded.

The witness here stated that he desired to correct his testimony already given as follows:

Instead of buying out Mr. Park in 1877, as stated, I bought him out in 1876. The legitimate business of S. N. Smith & Co. while Park was a member of said firm was simply the handling of Oliver Crook & Co.'s medicines. I never had any interest in "Wistar's Balsam," and, furthermore, there was never any "Wistar's Balsam" handled by me or the firm while he was a partner. The books don't show any such transaction.

Ques. 100. Do you say that you filled no orders for "Wistar's Balsam" during those years that Park was interested with you?

137 Ans. I think I did not. I haven't anything to show it.

Ques. 101. State whether or not you sent any orders from the Pacific coast to him or to Park and Sons during that time.

Ans. I hav-n't any recollection of doing so.

Question 102. Can you now state when you first began to ship this balsam to Reddington and Co.?

Ans. I think it was 1877.

Ques. 103. Had you previously shipped any to the Pacific coast?

Ans. Don't think I had.

Ques. 104. What sort of books have you which will show your shipment of this balsam during the past ten years? Please describe them.

Ans. I hav-n't anything but my regular books—my ledger—and that shows the sales, but not the shipments.

Ques. 105. Describe the style of entries in that book and in what way it shows the sale.

Ans. It charges the party with the goods that I sold the goods to.

Ques. 106. Have you never kept an "invoice book?"

Ans. Certainly—that is, I mean a book showing my purchases; that's what I mean by an "invoice book." I have no invoice book showing my sales.

Ques. 107. Doesn't that show your shipments?

Ans. This invoice book I speak of does not.

138 Ques. 108. Have you not been in the habit of sending a bill or statement with your shipments; and, if so, have you not in some form or other, other than in your ledger, made entries of those statements or bills; and, if so, where are they?

Ans. I have endeavored to keep them in a copy-book or to keep a copy of them.

Ques. 109. Are those in your letter-book or in some other copy-book or books?

Ans. In my letter-books.

Ques. 110. Will you produce to the notary all copies of such statements of shipments to parties on the Pacific coast during the past ten years and allow him to attach copies thereof to this deposition? You may point out to him such as pertain to such shipments and let him copy those only.

Ans. I will, providing I'm obliged to—that is, providing it is legal and you have a right to them.

Ques. 111. Have you taken any advice from lawyers or others touching the matter of producing the books and papers that I have asked for to-day?

Ans. I have not.

Ques. 112. Has one of the Mr. Parks, defendant herein, had access to any of the books to which I have referred to-day?

Ans. Only as I showed him the account.

Ques. 113. Did you communicate with the Messrs. Parks
139 after adjournment yesterday; and, if so, how?

Ans. I did, by telephone.

Ques. 114. Did you explain to them what I had called for?

Ans. No, sir.

Ques. 115. Were there any of them present yesterday at the examination?

Ans. No, sir.

Ques. 116. But they came up to-day, did they, at your solicitation?

Ans. Well, I can't say whether they came at my solicitation or not; I suppose they came to look at their interest.

Ques. 117. While Park was your partner did you deal in Crook's Wine of Tar?

Ans. Yes, sir.

Ques. 18. Did the Parks deal in it at the same time?

Ans. Yes, sir.

Ques. 119. Who was the proprietor of it at that time?

Ans. Mr. Park and myself were the proprietors.

Ques. 120. Was it dealt in by Park and Sons as well as by S. N. Smith & Co. at that time?

Ans. I don't know. I don't know whether Park and Sons existed at that time.

Ques. 121. Was Park's "Cincinnati house" dealing in it?

Ans. Yes, sir; I sold them "Wine of Tar."

Ques. 122. Am I to understand that you and Park were
140 the proprietors and not "Park's Cincinnati house," at that time, of the "Wine of Tar?"

Ans. Yes; that is it.

Ques. 123. Do you deal in this "Wine of Tar" now?

Ans. Yes, sir.

Ques. 124. Did you have revenue stamps of the description that I now show you in connection with the "Wine of Tar?"

Ans. Yes, sir.

Ques. 125. During what period of time did you have those?

Ans. From 1874 until the act touching proprietary medicines was repealed.

Ques. 126. Do you remember of ever furnishing any of those to Messrs. Park and Son?

Ans. I did.

Ques. 127. When, and under what arrangement with them, and for what purpose?

Ans. Mr. Park, being a partner in the house here, took them at

the same price as they cost us here. The house here furnished him at the same price that they cost us here. I furnished them, I suppose, to stamp their medicines.

Ques. 128. What medicines?

Ans. Their proprietary medicines—Park's.

Ques. 129. Had he or not stamps of his own adapted to his own medicines?

Ans. I don't know anything about it.

Ques. 130. Is it or not a fact that you, from time to time during the existence of the revenue law touching proprietary medi-
141 cines, made the original or first sales of this "Wistar's Balsam," placing upon it your own stamps designed for "Crook's Wine of Tar?"

Ans. No, sir; it is not a fact.

Ques. 131. Have you any distinct recollection of ever furnishing Mr. Park or Park and Sons with the stamp above referred to?

Ans. Yes, sir.

Ques. 132. Can you state any of the circumstances that enable you to remember it?

Ans. When he sent for any it was sent to him, and he could have ordered them himself, if he'd wanted any, right from Washington.

Ques. 133. The question is whether you have any distinct recollection of his ever ordering them from you; and, if so, whether you know of any reason he had for using your stamp?

Ans. Yes; I recollect of his ordering them. I presume he preferred to use them.

Ques. 134. Did he tell you so or is it a mere supposition on your part?

Ans. It is a supposition.

Ques. 135. State what the paper is, to which the stamp is attached, to which I have called your attention.

Ans. That looks to me like a wrapper for "Wistar's Balsam of Wild Cherry" used by Park.

(The paper referred to by the witness in last question and
142 answer is for the purposes of identification marked Exhibit 1 and signed with my initials, and is hereto attached.)

Ques. 136. Having looked at your book, can you now state what the balsam you have testified was shipped by you to the Pacific coast netted you after the deductions for freight?

Ans.—

Sept. 23, '79, I shipped	Reddington	&	Co.	2	gross; I collected from them	---	$160 00
Jan'y 1, '80,	"	"		1	"	"	---	77 86
Sept. 14, '81,	"	"		1	"	"	---	77 70
Feb'y 1, '82,	"	"		1	"	"	---	77 68
Sept. 7, '82,	"	"		1	"	"	---	77 68
Mar. 6, '83,	"	"		1	"	"	---	78 38
May 19, '83,	"	"		1	"	"	---	78 39
Dec. 12, '83,	"	"		1	"	"	---	78 39
Ap. 11, '83, I shipped	Jos. Hahn	&	Co.	1	gross balsam, and also 1 gross Smith's Wine Syrup, and collected on whole			166 37

Ques. 137. Since you bought out Park have you kept this article in stock in Dayton?

Ans. Well, I occasionally would have some, but not to keep it. At one time I had quite a quantity.

Ques. 138. When was that?

Ans. I can't give you the date.

Ques. 139. Approximately?

Ans. Can't do it.

Ques. 140. As you received these orders from the Pacific coast how did you fill them?

Ans. Well, I had the goods shipped to them.

Ques. 141. From where?

143 Ans. Sometimes from here, sometimes from Cincinnati.

Ques. 142. Who shipped them from Cincinnati?

Ans. I ordered John D. Park and Sons to do it.

Ques. 143. To whom did they render the bill or bills?

Ans. They rendered the bills to me.

Ques. 144. At what rates did they furnish you these goods?

Ans. At their schedule rates.

Ques. 145. What were the rates?

Ans. Most of the time I think they were $87.00; all of those mentioned in the statement already given, except the first one, were at $87.00. I can't say what that was before freight was deducted.

Ques. 146. Do you mean to say that you paid them $87.00 a gross for goods that netted you from $77.86 to $78.37?

Ans. That's what they billed them at.

Ques. 147. Were you acting for yourself or for them in these transactions?

Ans. Well, if I went down there and they'd take some goods of me at $84 and I'd take some goods of them, I was acting for myself. I was acting for myself at that time.

Ques. 148. What, in fact, did you allow or pay them on these bills that they rendered to you for these goods, at the rate of $87.00 per gross, you selling same as you have stated above?

144 Ans. They got the freight charged back to them—John D. Park and Sons.

Ques. 149. And you made nothing on these transactions?

Ans. Only when I made an exchange; when I took them straight I didn't; if they pushed enough of my goods to make it an object I'd make something; but that you can't tell anything about.

Ques. 150. So you and Park were operating together to push yours and his goods in these matters?

Ans. Well, I had no understanding about it; he knew very well I couldn't push his goods.

Ques. 151. Were you or not a sort of "go-between" as between Park and Sons and these Pacific-coast purchasers in these transactions?

Ans. Well, I don't know what you'd call a "go-between." I sold the goods and collected the money, and Mr. Park got his pay; whenever there was an exchange he got my goods.

Ques. 152. To what extent, if at all, have you shipped this "bal-

sam" to points west of the Rocky Mountains under orders from parties in the East, you rendering the bills to and being paid by these Eastern parties?

Ans. Well, all these shipments that I have reported to you, with the exception of Hahn and Co., were paid by these East-
145 ern parties—by Coffin, Reddington and Co.

Ques. 153. Is it your testimony, Mr. Smith, that you have never made any other shipments of this balsam to points beyond the Rocky Mountains than those you have named?

Ans. I don't understand that to be my testimony. I have given my testimony just as you have asked the questions.

Ques. 154. What other shipments than those named have you ever made to those points?

Ans. I find upon my books an entry, in 1877, of or a charge to these parties for ($776.40) seven hundred and seventy-six and $\frac{40}{100}$ dollars' worth—that is, ten gross—I mean to Coffin, Reddington & Co.

The entries of this shipment is as follows:

1877.

June 20. 10 gross ---------- $776 40

I also find on the books the following entry:

1878.

July 26. (5 gross, I think, judging from amount) ---------- $383 43

Ques. 155. Were these shipped from Dayton or from Cincinnati?

Ans. I am unable to say.

Ques. 156. Are you able to say what you allowed Park and Sons for these lots of goods?

146 Ans. They were allowed the amounts mentioned in the last answer; but whether I paid them in cash or goods I can't say.

Ques. 157. Have you now given all the shipments, so far as you know, that you have ever made or ordered to be made of this balsam to points beyond the Rocky Mountains, either from Dayton, Cincinnati, or any other point, including St. Louis and Chicago?

Ans. I don't recollect of any other shipments being made by me or ordered to be made.

Ques. 158. Have you been in the habit, within the past five or six years, of having Park and Sons ship this balsam on your order to points this side of the Rocky Mountains; and, if so, to what extent and under what arrangement?

Ans. Well, for instance, if I was in St. Louis and could get an order I'd send it to him. I may have done so and may not. I can't say to what extent——

Ques. 159. In such cases would you or not credit him with the whole proceeds, or how would you treat the transaction?

Ans. If I had goods here and shipped them I'd credit him with the proceeds. If it was sold less freight, and sold here, I'd
147 credit him with proceeds. It's according to how it was sold.

Ques. 160. State whether or not, throughout all this terri-

tory this side of the Rocky Mountains, you were authorized to sell this balsam at what you term the regular rates, less the freight to the different points to which it was to be shipped.

Ans. It depended upon the quantity about the freight. Their quantity was five gross. The rule was that we might sell 5 gross, less freight. We sometimes broke the quantity to 2½, and even as low as one.

Ques. 161. You can at the present time, can you not, under your relations with Park and Sons fill orders on these terms?

Ans. I have no relations whereby I could do it; don't know whether I could or not. I haven't sent them an order for some time.

Ques. 162. While you were acting for Park in St. Louis on what terms did you sell this balsam for Park as to rates or price, if you remember?

Ans. I believe their price was eighty-four dollars to the trade. I sold the goods there; Park paid the freight.

Ques. 163. Who has kept your books and aided you in this selling and shipping of goods during the past six or eight
148 years? Give their names and where they can be found.

Ans. Well, I've done my own selling the goods. John Kramer has done the shipping; he is over there with me now; he marked the goods. A gentleman by the name of Hollingsworth—Decatur Hollingsworth—kept my books; he was with me 2 or 3 years. Kramer 's been with me all the time. Hollingworth 's in Kansas. Mr. Eichelberger is my general man; keeps my books; he's been with me four or five years.

Cross-examination on behalf of defendants:

Ques. 164. Where did the parties to whom the balsam in question that you sold for Park, and from whom you obtained orders therefor to be filled by Park, reside—that is, in what States?

Ans. They resided in Missouri, Kansas, Nebraska, Iowa, Wisconsin, Minnesota, Illinois, Michigan, and perhaps a few in Ohio.

Ques. 165. If the price per dozen or gross were fixed by you in such sales or in taking orders state what it was.

Ans. Our prices were $84.00 per gross at that time and $7.50 by the dozen.

Ques. 166. What was the latest year in which any such
149 sales were made or orders taken by you?

Ans. I couldn't state what the latest year was.

Ques. 167. Before the adjournment at noon you stated, in answer to questions 95 and 96, that J. D. Park was interested in the profits made by you on sales of Wistar's Balsam, "and that he was credited on the books of the partnership between him and you with those sales." State now whether you have examined your books, since answering those questions, of the accounts of the partnership, and say whether there is any such entry therein. (I refer to the sales to parties in California.)

Ans. I have examined the books and find that during our partnership there was no shipment of "Wistar's Balsam" to California;

hence he had no credits. Of course I hav-n't gone over the whole account; there might have been a dozen or two shipped for my own use or to other points, but none went to California.

Ques. 168. In answer to question 154 you have stated there were two shipments of "Wistar's Balsam" to Coffin, Reddington & Co. Will you state, if you remember, to what points those shipments or either of them was made?

Ans. No; I don't know where they were made.

150 Re-examination on behalf of complainant:

Ques. 169. Have you ever made any shipments to Coffin, Reddington and Co. to any other point than California, so far as you can remember?

Ans. I don't remember whether I shipped them goods to any other point or not. I have shipped them other goods, aside from "Wistar's," to New York. I don't remember whether I shipped these to New York or California, or where.

Ques. 170. Have you any means of determining to what point you shipped those goods?

Ans. I don't know that I have or have not.

Ques. 171. Will you look at your papers and books to-night, and if you find anything which will enable you to fix the matter report it to the notary?

Ans. I have no objection.

SULLIVAN N. SMITH.

(Jan'y 23d, 1885, 5.30 o'clock p. m.—The further taking of these depositions adjourned, to enable witness to make the report mentioned in last question, until January 24th, 1885, at 10 o'clock a. m.)

151 January 24th, 1885, 10 o'clock a. m.—Adjourned until 2 o'clock p. m.

January 24th, 1885, 2 o'clock p. m.—The further taking of these depositions proceeded as follows:

In reply to R. question No. 171 the witness states:

I have found upon my copy-book, under date of June 20th, 1877, a charge to Coffin, Reddington and Co., New York city, of 10 gross of "Wistar's Balsam;" but I find nothing upon examination of my books and papers which enables me to state to what points the goods referred to in the last question were shipped.

I also find upon my copy-book a charge of 5 gross of "Wistar's Balsam" to Coffin, Reddington and Co., New York city, under date of July 23d, 1878. I do not find anything which enables me to state to what point the goods mentioned in either of these charges were shipped. I find that the freight on the ten-gross charge was sixty-three $\frac{60}{100}$ ($63.60) dollars, and upon the five gross, thirty-six $\frac{57}{100}$ ($36.57) dollars.

SULLIVAN N. SMITH.

152 THE STATE OF OHIO, } ss:
Montgomery County, }

I, George R. Young, a notary public in and for said county of Montgomery and State of Ohio, duly commissioned and qualified, do hereby certify that the above-named Sullivan N. Smith was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth in the cause mentioned in the caption prefixed to the foregoing deposition, and that the foregoing deposition by him subscribed was reduced to writing by me and subscribed by the said witness in my presence, and was taken at the time and place in the annexed notice specified, and was continued from day to day and time to time as above set forth.

And that I am not counsel, attorney, or relative of either party to said action or otherwise interested in the event of said suit.

In testimony whereof I have hereunto set my hand and official seal this 24th day of January, A. D. 1885.

[SEAL.] GEORGE R. YOUNG,
Notary Public in and for Montgomery County, Ohio.

153 And afterward, to wit, on the 21st day of February, in the year last aforesaid, came the said respondents herein, by their said solicitors, and filed in the clerk's office of the court aforesaid in this cause their certain exceptions to the depositions of John H. Francis and others, theretofore filed herein, clothed in the following words and figures, to wit:

154 *Def'ts' Exceptions to Depositions of John H. Francis and Others.*

United States Circuit Court, Southern District of Ohio.

S. W. FOWLES & Co., Complainants,

vs.

JNO. D. PARK & SONS, Defendants.

Exceptions to depositions by defendants.

The defendants except to the depositions of John H. Francis on the following grounds, to wit:

1. To the 27 question and answer of the direct examination, because the matter of the answer is incompetent.
2. To the 30 questions and answers thereto, because the question and answer are irrelevant and incompetent.
3. To the 31, 32, 33, & 34 question- and answer- and each of them, because the matter thereof is incompetent and irrelevant.
4. To the 36, 37, & 38 question- and answers thereto and each of them, because incompetent and irrelevant.
5. To 39, 40, 41, & 42 questions and answers and each of them, because incompetent and irrelevant.
6. To 43, 44, 45, 46, 47, and 48 questions and answers thereto and each of them, because incompetent and irrelevant.
7. To 49, 50, 51, 52, & 53rd question- and answer- thereto and

each of them, and to Exhibits No. 1 & 2 and each of them, because incompetent and irrelevant.

155 8. To answer to question 58, cross-examination, because not responsive to the question.

9. To answer to question 59, cross-examination, because incompetent and irrelevant.

10. To questions 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, & 79 and answers thereto and each of them, because irrelevant and incompetent.

To the deposition of Jno. F. Henry, as follows:

To questions 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and the answers thereto and each of them, and to Exhibits Nos. 3 & 4 and each of them, because irrelevant and incompetent.

2. To questions 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, & 65, and the parties now referred to in question 35 and pamphlet referred to in question 59 and to each of them, because irrelevant and incompetent.

3. To questions, on cross-examination, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, & 109, because irrelevant and incompetent.

4. To the entire redirect examination and to each question and answer thereof, because irrelevant and incompetent.

156 To the deposition of James Higgins on the following grounds, to wit:

1. To the 9th, 10, 11, 12, 13, 14, 15, & 16th questions and the answers thereto and each of them, in the direct examination, and to the bill referred to in the 9 question, because irrelevant and incompetent.

2. To the answer to question 20 of the cross-examination, because not responsive to the question and irrelevant and incompetent.

To the deposition of Isaac Sherwood Coffin on the following grounds, to wit:

1. To the 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 questions and the answers thereto and to each of them, because irrelevant and incompetent, and defendants pray that the parts of said depositions to excepted so may be suppressed.

O'HARA & BRYAN,
For Defendants.

157 And afterward, to wit, on the 25th day of February, in the year last aforesaid, came the said respondents herein, by their said solicitors, and filed in the clerk's office of the court aforesaid in this cause their certain exceptions to the deposition of S. N. Smith, theretofore filed therein, clothed in the following words and figures, to wit:

158 *Def'ts' Exception- to Deposition of S. N. Smith.*

United States Circuit Court, Southern Dist. Ohio.

S. W. FOWLE, &c., Compl'ts,
against
JNO. D. PARK & SONS, Def'ts

Exception to S. N. Smith's deposition.

The defendants excepted to the deposition of S. N. Smith, taken herein on behalf of the complainants, on the following grounds, to wit:

1. To the 29 question and answer thereto, because the same is incompetent as testimony, being a mere interpretation by the witness of his last preceeding answer.

2. To the 39 question and answer thereto, because incompetent.

3. To the 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 72, 74, 75, 76, 77, 78, 79, 80, 82, 83, 84, 85, 86, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 171, and to each question and answer, because the testimony elicited is incompetent and irrelevant, and to the papers referred — in questions and answers 124 and 135, because incompetent and irrelevant, and to each and all copies or extracts from
159 the account books of the witness, because incompetent and irrelevant as testimony in this cause, and pray that the same may be suppressed.

O'HARA & BRYAN,
For Defendants.

160 And afterward, to wit, on the 4th day of April, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause clothed in the following words and figures, to wit:

Journal Entry W, 81.

SETH W. FOWLE & SONS
vs.
JOHN D. PARK & SONS. } Chancery. 3624.

Upon application to the court, leave is granted the complainants to file an amendment to their bill in this cause forthwith, and the same is filed.

And afterward, to wit, and on the day and year last aforesaid, came the said complainants herein aforesaid, by their said solicitors, and filed in the clerk's office of the court aforesaid in this cause their said amendment to bill clothed in the words and figures following, to wit:

161 *Amendment to Complaint.*

Circuit Court of the United States, Southern Dist. of Ohio. In Equity.

SETH A. FOWLE & HORACE S. FOWLE, Partners as Seth W. Fowle and Sons,
vs.
JNO. D. PARK, AMBRO R. PARK, & GODFREY F. PARK, Partners as John D. Park and Sons. } 3624.

Now come the complainants and, by leave of court, amend their complaint by inserting after the words "and that the defendants may be decreed to pay the complainants what, upon the taking of such account, may be found due them for their losses and damages," in the prayer of said complaint, the following words, to wit: "And also all damages and losses which they, the complainants, have sustained in consequence of the violation of duty and contract as aforesaid on the part of the defendants, the whole damage and injury so sustained, including such loss of profits, amounting, as they aver, to the sum of fifteen thousand dollars ($15,000.00)."

McGUFFEY & MORRILL,
Solicitors for Complainants.

162 And afterward, to wit, on the 3d day of June, in the year last aforesaid, came the said complainants herein, by their said solicitors, and filed in the clerk's office of the court aforesaid in this cause certain depositions theretofore taken herein on their behalf clothed in the following words and figures, to wit:

163 *Complainants' Testimony. Depositions of G. F. Park and Others.*

STATE OF OHIO, *Hamilton County,* } *ss:*

Case No. 3624, Pending in U. S. Circuit Court for Southern Dist. of Ohio.

SETH A. FOWLE & HORACE S. FOWLE, Partners as Seth W. Fowle & Sons, Complainants,
vs.
JOHN D. PARK, AMBRO R. PARK, & GODFREY F. PARK, Partners as John D. Park and Sons, Defendants.

The above-named defendants will take notice that on Thursday, the 12th day of February, A. D. 1885, the complainants above named will take the depositions of sundry witnesses, to be used as evidence in the trial of the above cause, at the law office of McGuffey & Morrill, room 11, College b'ld'g (108½ Walnut St.), Cincinnati, Ohio, in the county of Hamilton, in the State of Ohio, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the

taking of the same will be adjourned from day to day between the same hours until they are completed.

Service of the above notice is acknowledged and proof of the official character of the officer before whom the said depositions may be taken is by agreement waived; also all exceptions as to time.

Done this 9th day of Feb'y, 1885.

McGUFFEY & MORRILL,
Attorneys for Complainants.
O'HARA & BRYAN,
Attorney- for Defendants.

164 Deposition- of sundry witnesses, taken before me, Chas. M. Hepburn, a notary public in and for the county of Hamilton, State of Ohio, pursuant to the annexed notice and at the time and place therein specified, to be read in evidence on behalf of the complainants in the case in which Seth A. Fowle and Horace S. Fowle, partners as Seth W. Fowle and Sons, are complainants and John D. Park, Ambro R. Park, and Godfrey F. Park, partners as John D. Park and Sons, are defendants, now pending in circuit court of U. S., southern dist. of Ohio, in equity, No. 3624.

Present, on behalf of complainants, H. A. Morrill; present, on behalf of defendants, none until Wednesday morning, Feb'y 18th, 10 o'clock, when J. O'Hara, of counsel for def'ts, appeared.

STEPHEN M. McKENZIE, of lawful age, being by me first duly cautioned and solemnly sworn, deposes and says as follows:

Ques. 1. State your name, residence, and business, and how long you have been engaged in such business.

Ans. My name, Stephen M. McKenzie; age, 50 years; residence, 178 Richmond street, Cincinnati; business, proprietary medicine business of the firm of J. N. Harris & Co., Limited. It has been 35 years since I went into the concern as a boy.

165 2. What are your particular duties in connection with the business?

Ans. I have been a sort of general manager next to Mr. Allen.

3. State whether or not you are familiar and have been for the last six or eight years familiar with the correspondence of the firm and the orders it has received for goods to be shipped.

Ans. Yes; I am familiar with all the correspondence, and am very particular with the orders.

4. State whether or not you have had dealings in the last six or eight years with John D. Park and Sons. And, if so, what was the nature of those dealings and subject-matter of them?

Ans. We have had dealings with John D. Park and Sons ever since they were a firm, buying of them and sold to them—buying their goods and selling them ours.

5. What description of goods did you buy of them?

Ans. We bought anything in their line that we had an order for and didn't have ourselves.

Q. State whether or not you bought of them or ordered of them

"Wistar's Balsam of Wild Cherry;" if so, to what extent, during what period of time, and to what points it was shipped, so far as you can state.

Ans. We have bought "Wistar's Balsam" of them and
166 anything else that they had, but how much, particularly of Wistar's Balsam—I don't believe we have ever bought as much as a gross and a half of them at the outside.

7. Have you or not sent to them orders for Wistar's Balsam from your customers to be filled by them; and, if so, to what extent and from what points did these orders come?

Ans. Never sent them an order to be filled by them.

8. Have you any knowledge of any such orders being sent through your house to them?

Ans. We have never received an order to them through us.

9. Have you had any correspondence at any time with parties on the Pacific coast in regard to procuring a supply of this balsam?

Ans. We had an order from a firm in San Francisco or Sacramento—Kirk, Geary & Co., I believe—for a gross. This is the only order for that amount, from that part of the country or anywhere else, that we have received for this balsam; it was several years ago.

10. In what way did you fill this order, and how was it shipped?

Ans. We received a letter, from this firm with an order, and we sent up to John D. Park and Sons for a gross of the balsam, and shipped it by rail to California.

11. Who shipped it, and from what house did it go?

167 Ans. It was shipped from our house by the man who hauls our goods, on our bill of lading.

12. In what way did you communicate with John D. Park in regard to the matter; did you send the order, communicate by letler—how?

Ans. Well, I don't remember how. We would probably, in such a case, send up a note by a boy, who would bring back the things ordered if he could carry them; otherwise we would have them sent to us.

13. Have you the copy of the bill or invoice showing by whom and on what terms this balsam was shipped; and, if so, will you furnish me a copy or allow me to take a copy?

Ans. I presume we have one, as we have all our business papers intact. For myself I have no objection to your having a copy.

14. State, if you are able, on what terms you bought and on what terms you sold this balsam.

Ans. I couldn't say exactly what the terms were without referring to our books. I will look at our books for the purpose of answering this question and to ascertain the date of the transaction.

15. Are you able to recall any other shipments of this article to the Pacific coast or elsewhere?

Ans. I am sure that we never sent any other lot to Cali-
168 fornia. We have sold so little that I can't remember shipping any other at all anywhere, but we probably furnished a few bottles now and then to some of our customers.

16. Have you any knowledge of Park and Sons shipping this article to the Pacific coast during the last six or eight years?

Ans. I have no knowledge of it. I know nothing about their business, except such as is transacted between their house and ours.

17. Have you had any dealings with or correspondence with S. N. Smith, of Dayton, in regard to this article within the past six or eight years?

Ans. We have not. We have no correspondence with Mr. S. N. Smith at all.

18. Have you personal knowledge of all the correspondence and dealings of your house such as would enable you to know if their had been any handling of this article other than what you have stated?

Ans. I have. There has not been any; could not be any without my knowledge.

19. Will you please look at your books and correspondence, so far as is practicable, and inform yourself as to what other transactions in this article, other than the one named, you have had? Report the result of your investigations to the notary at your earliest convenience.

169 Ans. I am perfectly willing to do so if I think I can find any evidence of such transactions.

20. State whether or not you deal with Crane & Bingham, of San Francisco.

—. We do not.

21. Have you had any dealings or correspondence touching this article with parties east of the Alleghany Mountains during the past six or eight years, or at any time?

Ans. We never had; the only transactions we have had is this one California article.

STEPHEN M. McKENZIE.

(Adjourned until 3.30 p. m., Thursday, Feb'ry 12, to give witness opportunity to examine books and papers.)

THURSDAY, *Feb'ry* 12—3.30 p. m.

Witness, S. M. McKenzie, furnishes two papers, marked "Exhibit A" and "Exhibit B" and made a part hereof, as the result of his investigations.

(Adjourned until Friday, Feb'ry 13, 1885, 9.30 a. m.)

FRIDAY, *Feb'ry* 13, 1885.

Taking of testimony resumed pursuant to adjournment, S. M. McKENZIE testifying:

22. Look at the paper I now submit to you and state what it is.

170 Ans. It is a copy of the original bill of lading for June 2, 1883, of 6 boxes of Wistar's Balsam shipped to Kirk, Geary and Co., in Sacramento, being the balsam referred to yesterday as shipped to them.

23. Please state what the paper I now hand you is.

Ans. It is the correct copy of the original bill sent to Kirk, Geary & Co., Sacramento, for six boxes of Wistar's Balsam, June 2, 1883, being for the balsam referred to in last answer.

24. How many dozen did these six boxes contain?

Ans. Two dozen each.

25. What did you receive, nett, for this lot of balsam?

Ans. I shall have to look at the books again for this.

26. What did you pay Park and Sons for this—the amount that you received nett or a different sum?

Ans. We paid whatever we received nett and made nothing on it. We gave them credit for the amount of the bill, $87.00, and charged them back with the difference deducted for the freight, whatever that was.

27. Did you know, at the time you shipped it, that they would assent to that arrangement; and, if so, how?

Ans. I do not remember whether this arrangement was made before or after the shipment?

171 28. With whom did you adjust this matter of deducting the freight—which of the Parks?

Ans. I can't say which one of them it was. I know it was one of the firm. Possibly I sent a note to them.

29. State whether in that connection you explained to the party where to ship to.

Ans. I can't say certainly that I did or did not; may have done so or may not.

30. According to your course of business, if you deducted the actual freight, would you or not have told them the point to which you shipped it?

Ans. It is not policy or business to do so, but I may have done so or might do so.

31. Did you at that time have any knowledge of their having a rule by which a fixed amount for freight was deducted without regard to the point to which the shipment was made?

Ans. I know nothing about their rules or prices.

82. Have you any knowledge what member or employé of your firm communicated with Park and Sons in connection with this transaction?

Ans. I don't know. I only know what the books show. I can't recollect the circumstances. It was more likely that I did rather than anybody else.

33. Now, will you state what you paid Park and Sons for this Wistar's Balsam in your settlement with them, and, if less than $87.00, whether you paid freight on these goods, and whether

172 this was the amount you deducted in your settlement with Park and Sons, and also state the amount of that freight?

Ans. In settlement we credited them with full amount the bill for the goods—$87.00—on July 2d, '83. We charged Park and Son back with the freight, $7.20; that full amount, $7.20, which was deducted from the $87.00—that is, Kirk, Geary & Co. remitted to us

$79.80, they paying the freight out of the $87.00, and this we paid Park and Sons.

STEPHEN M. McKENZIE.

173 GODFREY F. PARK, of full age, being first by me duly cautioned and sworn, deposes and says as follows:

1. Please state your name, age, business, and how long you have been in such business, and whether or not you are one of the defendants.

Ans. G. F. Park; 33 years; wholesale patent medicine. I believe I am one of the defendants.

2. What is the style of your firm, who are members of the firm, and how long have they respectively been in such firm?

Ans. John D. Park and Sons. John D. Park, A. R. Park, and G. F. Park. John D. started the firm in 1841. I think A. R. Park and I came in together about 1875 or 1876.

3. How long have you been engaged in helping to carry on the business of either John D. Park or John D. Park in connection with other parties?

Ans. I think about sixteen or seventeen years.

4. What have been your duties in connection with the carrying on of this business?

Ans. Traveller, cashier, shipping clerk.

5. State whether or not you have been familiar with all the correspondence of and shipments made by this firm during this period.

Ans. No; not during this time.

6. During what period have you such familiarity, if at all?

174 Ans. I know nothing about the correspondence during any time. The shipments I am familiar with whenever I have been in the house and employed as shipping clerk.

7. During what period of time have you been employed as shipping clerk?

Ans. Off and on since, probably, 1871.

8. During this time who else than yourself has had charge of the shipping or had to do with the shipping?

Ans. I think my brother Charles.

9. For how long a period has he had something to do with the shipping and where is he now?

Ans. I don't remember how long he has been doing the shipping. He has been employed as traveler for over a year. He is, I suppose, at home now. For about a year before he commenced travelling he did the shipping. He is a man of about twenty-two years. During my absence he may have done the shipping.

10. Who besides yourself and Charles, if any, has had to do with the shipping since 1871?

Ans. I don't remember.

11. Do you know whether any one has?

Ans. I couldn't say. I hardly think so. We two have attended to about all of it.

12. What clerks or employés have you had in your house, aside from members of your own family, since 1871?

175 Ans. I couldn't name them without referring back to the pay-rolls, &c.

13. Will you please give me the names of such clerks or employés as you now have or as you have had in the last seven years, as well as you can remember, and their places of residences?

Ans. Now we have S. R. Park, of our family; William Park, of our family—both brothers of mine; James B. Sanford, Robert E. McGeorge, Chas. Schultz, Joe Umblo; these last two are laborers and have nothing to do with the business affairs. McGeorge is an entry clerk.

14. How long have Sanford and McGeorge been with you?

Ans. McGeorge has been with us probably five years or six; Sanford about three or four years.

15. Who did the work of Sanford, McGeorge, and your brother Charles, respectively, prior to their employment?

Ans. Sanford has charge of the advertising department, which was started when he was taken in. Susie Park, a sister, did the work of McGeorge before his time. I and my brother Ambro travelled before Charles.

16. Who has had charge of the correspondence since 1871?

Ans. I think my brother, A. R. Park, did when he has been present.

176 17. Who had charge of it when he was not present?

Ans. I couldn't say; I guess it took care of itself.

18. Who opened, read, and answered the letters?

Ans. My father opens them generally when he is present; A. R. Park answers them if there any to be answered; when my father is not present my brother, A. R., probably opens the letters.

19. State whether or not all business letters since 1871 to the firm have been preserved. If not, in what form, and what has become of them?

Ans. I don't think that the letters are preserved at all, unless they have been of great importance. I think they file them away for a year or two, or did so until about three years ago, when we got a patent letter file, and since then we keep the important letters.

20. How far back have you preserved and *and* have accessible the business letters to your firm?

Ans. I don't know.

21. Where are such letters as you have?

Ans. Some may be in the safe; some probably in the warehouse.

22. Have you not these letters labelled and filed away so that they are accessible to you.

Ans. I never had anything to do with the letters or filing them away or marking them.

177 23. Who knows more about this matter than yourself?

Ans. I don't know who would know more; my brother Ambro would probably know.

24. State whether or not you know of any custom in your house during the past six or eight years of labelling and filing away for preservation business letters coming to the house during the past six or eight years.

Ans. I don't know how long we have had the patent letter file; since then we have, I guess, kept the business letters; before that the letters were thrown away after a year or two; went as waste paper.

25. Do you know whether you have in existence any business letters received prior to your procuring this patent letter file?

Ans. I suppose there are some.

26. What has become of the orders you have received within the past six or eight years?

Ans. Well, I suppose some were preserved, but the majority, I suppose, were thrown away; all city orders, I know, were kept only three or four months; possibly a year.

27. Have you used order books; if so, for how long a time and what has become of them?

Ans. We don't use order books; we use original orders.

178 28. What entries, if any, are made when an order comes in, and what when it is fil-ed, according to your course of business?

Ans. The name of the order, the date, and the number of items are recorded in a book; when the order is filled the goods are charged.

29. What has become of the books in which such charges were made during the past six or eight years?

Ans. I guess we have them.

30. State whether these books show the residences of the parties buying the goods.

Ans. I guess they do.

31. State whether during the past six or eight years you have kept letter-press copies of your answers to business letters. If so, where are those letter books?

Ans. I suppose there are such books. I guess they are in the office.

33. State whether or not during the last six or eight years you have kept invoice books showing shipments to parties.

Ans. No, sir.

34. What, if any, books have you showing the extent, nature, and destination of shipments of goods made by you during the past six or eight years?

Ans. We keep no shipping books.

35. When you make a shipment of goods what communication, if any, do you send to the consignee?

Ans. We send him a bill of the goods.

179 36. State whether or not you keep a copy of such bills; and, if so, in what way.

Ans. The entry on the book is a fac-simile of the bill.

37. What book?

Ans. The sales book.

38. Where are such sales books?

Ans. Somewhere in our building.

39. Have you or not been in the habit of sending letters with such bills; and, if yea, have — kept letter-press copies of them?

Ans. I don't know.

40. State whether or not your firm deals in Wistar's Balsam of Wild Cherry; and, if so, to what extent.

Ans. Yes, sir; we sell a pretty fair amount of it. I can't say exactly how much.

41. Do you know anything of the existence of a contract between one Lewis Williams and Sanford and Park touching the manufacture and sale of Wistar's Balsam of Wild Cherry?

Ans. I know of such a contract between a Williams and Sanford and Park.

42. Where is this contract—in whose possession?

Ans. I think the original is in the safe.

43. State whether or not you manufacture this balsam.

Ans. Yes; we manufacture it and sell it. We, I suppose, make it from the recipe or formula referred to in the contract named above.

180 (Adjourned till 2.30 p. m., Friday, Febr'y 13, '85.)

FRIDAY—2.30 p. m.

Resumed pursuant to adjournment, G. F. PARK testifying:

44. State whether you are now able to give approximately the yearly amount of sales of this balsam by your house.

Ans. Yes.

45. Where or to what points chiefly have you shipped this balsam within the last seven or eight years?

Ans. The principal points: Pittsburgh, Cleveland, Toledo, Detroit, Chicago, Milwaukee, St. Paul, Omaha, Kansas City, St. Louis, Indianapolis, Louisville, Nashville, Memphis, New Orleans.

46. State whether or not you shipped to Reddington and Company, of Sacramento, two gross of this balsam on or about the last of September, 1879.

Ans. Not as I recollect.

47. Have you or not shipped to them any balsam between the years 1879 and 1883, inclusive?

Ans. I don't remember any.

48. Are you able to state that you have not done so?

Ans. Not without referring to our triple sheets.

49. If you have so shipped this balsam what have you, if
181 anything, that will indicate it or help you to determine the fact?

Ans. The triple sheets are the only thing, if we have them yet.

50. Please explain what the triple sheets are.

Ans. A strip of paper about 18 inches long.

51. What do they contain, who makes them up, and for what purpose are they made?

Ans. They contain the name of the party to whom the goods are to be shipped; I make them up; for memorandum to make the bills of lading from for the dray tickets.

52. What becomes of those triple sheets after they are used?

Ans. We save them for about two years or three and then throw them away.

53. Are the triple sheets of your shipments during the last three or four years in your possession?

Ans. They may be for three years; I don't know for a longer time.

54. Will you please produce as soon as convenient, on adjournment, the triple sheets in the possession of your house covering shipments of balsam during the past ten years, for the purpose of inspection by me, and if not convenient to bring them here will you name a time at which I can examine them?

Ans. We will produce all we have of them.

55. If you have made shipments of balsam to Reddington & Co., of Sacramento, *to* within the past ten years, state whether or
182 not, according to your course of business, entries against them for such balsam would appear in your sales books or in other books?

Ans. They would appear in the sales books.

56. Are you able to state whether there are any such entries?

Ans. No.

57. Will you inspect the books to see whether there are and report the result of your investigation, and also submit the books to my inspection?

A. Yes.

58. Have you or not shipped to Reddington & Co., within the past five years, balsam upon orders sent you by L. N. Smith, of Dayton, Ohio; and, if so, at what dates, in what quantities, and what did the sales net you; and in these transactions, if any, was your account with the parties to whom the goods were shipped or with L. N. Smith?

Ans. I don't recollect.

59. Will the examination of your books enable you to answer this question wholly or in part; and, if so, will you examine them and then answer the question?

Ans. I guess they will. I will examine and then answer.

60. What transactions have you had with L. N. Smith, of Dayton, touching Wistar's Balsam, during the last ten years, at any
183 time, if any?

Ans. I think we once put up a lot of Wistar's Balsam with him as collateral security. We have also sold it to him, and have kept a lot with him in stock.

61. When did you put this up as collateral security, what quantity, what became of it, and what did it net you?

Ans. About 1877, when we failed; don't remember the quantity; possibly $500 worth. I think we ordered it all away. I will say it netted $84 a gross. I am pretty sure that was about it.

62. What sales have you made to him during that period?

Ans. I couldn't state without referring.

63. Will you please look at your books and report what sales you have made directly to L. N. Smith, of Dayton, within the last ten years?

Ans. Yes.

64. You speak of your territory. What do you claim is embraced in your territory?

Ans. As a rough estimate, the Alleghany and the Rocky Mountains.

65. Please state whether, within the past five or six years, you have shipped this balsam to any party on the Pacific coast, excluding from this question Reddington & Co., upon orders sent you by L. N. Smith.

Ans. I have no recollection of doing it.

66. Will you be able to answer this question definitely by looking at your books?

184 Ans. I think so.

67. State whether or not, within the last ten years, you have shipped this balsam to the Pacific coast upon the order of any other party than L. N. Smith.

Ans. No; I believe not.

68. Have you had any dealings with Abram and Carroll, of San Francisco, within the past six or seven years?

Ans. No; not to my knowledge.

69. Have you had any dealings with Charles Langley & Co., of the same place, during that period of time?

Ans. I have no recollection of such a firm or of having anything to do with them.

70. Have you ever shipped goods to Reddington & Co., of San Francisco, on the order of Coffin, Reddington & Co., of New York?

Ans. Not as I remember.

71. Are you prepared to say that you have not shipped this balsam to Reddington & Co., of San Francisco, on the order of Coffin, Reddington & Co., of New York?

Ans. No.

72. Will you examine your books and give a definite answer to this question, if then able?

Ans. Yes.

73. Do you know anything of a firm by the name of Langley and Michels, on the Pacific coast?

Ans. I do not.

185 74. Do you know anything of a firm by the name of Crane and Bingham, on that coast?

Ans. I have heard of them.

75. Have you had any business transactions with them during the past ten years?

Ans. I think not.

76. Have you not shipped to them Wistar's Balsam during that time?

Ans. I don't remember of any.

77. Are you prepared to say that you have not?

Ans. No.

78. If you have, will your books show it; and if yea, will you examine them for the purpose of answering these questions more definitely?

Ans. I think they would. I will look and see.

79. Are you not aware that Crane and Bingham, of San Francisco,

have kept a supply of your balsam on hand for several years last past and have been engaged in selling it?

Ans. No.

80. Have you had any communication with them about the matter of selling your balsam during the last four or five years, either directly or through others?

Ans. No.

81. Did you ever know anything of the old firm of Hosteter, Smith and Dean, of Sacramento?

186 Ans. I have heard of such a firm.

82. Did you ever ship them any of your balsam?

Ans. They must have gone out of existence before my time.

83. Do you know anything of a firm of J. J. Mack & Co., of San Francisco?

Ans. No.

84. Please look at a letter submitted to you dated Aug. 28th, '78, and one of July 31st, '78, both directed to John D. Park and Sons, and state whether or not your firm received letters of which these purport to be copies.

Ans. I never saw the originals, to my knowledge.

85. Will you examine for any letters in the possession of your firm from S. W. Fowle & Sons to said firm, dated either in July or August, 1878; and, if any are *fraud*, produce them?

Ans. Yes.

86. State whether, within the past ten years, you have shipped any of this balsam to New York.

Ans. I don't recollect if any.

87. State whether or not, on or about Sept. 25, 1876, you shipped five gross of this balsam to John F. Henry, Curran & Co.

Ans. I don't recollect. I think our books will show it if any was shipped. I will examine and report.

88. Will you also examine as to whether you shipped to

187 the same party some of this balsam in July, 1876, in Oct., 1874, and whether you so shipped it on any other occasion during said times? And, if so, give dates, amounts, price charged, freight allowed, &c.

Ans. Yes.

89. State whether or not you have any business acquaintance with a party in New York of the name of C. N. Crittenden; and, if so, whether, in the past five years, you have shipped any of this balsam to him.

Ans. I know Crittenden & Co. I have no recollection of shipping them any balsam.

90. Are you prepared to say that you have not done so within five years.

Ans. No.

90. Will you look at your books, particularly for the year 1880, and report whether you find any such transactions; and, if so, the terms of the transactions?

Ans. Yes.

91. Have you any knowledge of shipments of this balsam to any

party in New York other than those I have named in the foregoing questions?

Ans. No.

92. Have you ever shipped this article to Norfolk, Virginia?

Ans. No.

93. How many sales books have you covering your sales for the past ten years, and how large are these books?

188 Ans. Don't know how many there are; pretty good-sized books.

G. F. PARK.

(Adjourned until Saturday, 14 Feb'y, '85, 2.30 p. m.)

SATURDAY, 14 *Feb'ry*, '85—2.30 p. m.

Taking of testimony resumed, W. B. GRUBBS, JR., being called in absence of G. F. Park.

W. B. GRUBBS, of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

1. State your name, age, and residence.

Ans. W. B. Grubbs, Jr.; 25 years; 172 Plum street, Cincinnati.

2. Have you ever bought any Wistar's Balsam of Wild Cherry of the firm of John D. Park and Sons?

Ans. I have not.

W. B. GRUBBS, JR.

Adjourned until Monday, Feb'ry 16, 2.30 p. m.

MONDAY, *Feb'ry* 16—2.30 p. m.

Examination of G. F. PARK resumed pursuant to agreement.

G. F. PARK testifies:

94. Are you able now to state the yearly amount of your sales of Wistar's Balsam?

Ans. Yes; I guess I could.

189 95. What is it approximately?

Ans. I refuse to answer.

96. What are your reasons for refusing?

Ans. I have several.

97. Do you decline to give any of them?

Ans. No; I don't decline to give any of them.

98. Are you willing to give any of them; if so, which?

Ans. Well, one reason is that I think you have something else in view besides the case. Another reason is that I don't think you have any right to ask the question.

99. Please state whether you have received from notary a subpœna to produce such triple sheets of shipments of balsam and sales books of your concern as would cover the transactions of the last ten years, and touching which you testified in your last examination?

Ans. Yes; there was such a subpœna served on me.

100. Are you prepared to produce any such papers or books?

Ans. No; I am not prepared to produce any of them.

101. Are you able to produce any such books or triple sheets if you choose so to do?

Ans. Yes; I could produce triple sheets for the year 1884 and 1883, and, probably, books covering the years '79, '80, '81, '82, '83, '84.

190 102. When did you last see any of these triple sheets for the years prior to 1883?

Ans. I couldn't state. I think that probably I haven't seen them since they were filed away or destroyed.

103. Which of them have you seen since this action was commenced, if any?

Ans. None besides these for '83 and '84.

104. What has become of your sales books prior to '79?

Ans. I don't know.

105. When did you last see them?

Ans. I couldn't state.

106. Are they in existence?

Ans. I couldn't state that.

107. Have you searched for them since your last examination?

Ans. Yes.

108. Are you able to find them?

Ans. I was not.

109. Where did you find those which you did find?

Ans. Some in the office and some packed away in a box and some on floor (3rd floor) of the warehouse.

110. How many separate sales books did you find?

Ans. I didn't count them; I suppose there were eight or ten.

111. Do you decline to produce these books or any of them, and also do you decline to produce the triple sheets referred to?

190½ Ans. I decline to let them go out of our possession, but I am willing that anybody should examine them.

112. Do you decline to bring them here or have them brought here by us under your supervision for the purpose of their examination here in your presence?

—. Yes; for I couldn't spare the time to be present here while the books were being examined.

113. Can I now go to your office and examine these books in or outside of your presence, as you may desire, you permitting me to inspect them for that purpose?

Ans. Yes; but we wouldn't permit you to take memoranda of matters not in the case or of the amount of Wistar's Balsam sold.

114. Are you prepared to state what amount of Wistar's Balsam these books indicate to have been sold during the period they cover, the prices, and to whom sold or shipped?

Ans. No; it would be impossible.

115. Do these books show sales or shipments of balsam to Reddington & Co., Sacramento?

Ans. No.

116. Have you any account on these books with Reddington & Co., or do their names appear on the books?

Ans. I think not.

191 117. Have you examined the books so that you can say their name does not appear on them?

Ans. I examined the books; yes.

118. Do you know that the books have not the name of Reddington and Co. on them?

Ans. There is no charge against Reddington and Co. on them.

119. Are you able to state now whether within the past five years you have shipped balsam to Reddington & Co. on the order of L. N. Smith or orders sent you by him—L. N. Smith, either?

Ans. There is nothing that I could find showing any such shipments.

120. Have you made any such shipments?

Ans. Not to my knowledge.

121. Have you made shipments of balsam anywhere within the period covered by those books upon orders sent you by L. N. Smith or upon his order?

Ans. Yes.

122. When shipments of balsam were made on his order how does it appear on your sales book?

Ans. It appears as a charge to L. N. Smith & Co., of Dayton, Ohio.

123. In such cases does that sales book show when it was shipped?

Ans. The general inference is that it was shipped as charged when the sales book does not state the contrary.

192 124. Is there any balsam charged against L. N. Smith on these sales books which was not shipped to him?

Ans. I don't know.

125. If there is any such will that fact appear on the books?

Ans. It ought to.

126. Is there any indication on these books, in connection with charges against L. N. Smith, of balsam being shipped to other points than Dayton, Ohio?

Ans. Not that I discovered.

127. What is the amount of balsam charged against L. N. Smith on such sales books as you have in your possession, with the dates and prices?

Ans. I forgot to take a memorandum.

128. Have you any triple sheets showing shipments of balsam to Reddington & Co. or Crane and Bingham, either?

Ans. No.

129. Have you ever seen any, to your knowledge?

Ans. I don't remember of any.

130. Do your sales books show any sales of balsam to C. N. Crittenden, New York?

Ans. Yes.

131. When and what amount?

Ans. July 19, 1880; 2 doz., at $7.25 a doz.

132. Do they show any other sales of balsam to him?

Ans. Not as I could find.

133. In what shape do you find that on the books?

193 Ans. It is charged with other goods.

134. In answering the question touching sales to Crittenden, what paper or memorandum did you use in testifying?

Ans. A mere private memorandum.

135. Will you look at Exhibits "3" and "4," attached to a deposition in this cause taken in New York, filed Dec. 15, 1884, and see whether there are bills rendered by your house for the sale of balsam by them to John F. Henry, Curran & Co.?

Ans. The bill is ours, but I don't recognize the handwriting or the quantities, nor do I think it refers to our balsam. It doesn't look like our way of shipping.

136. Do you claim that that bill, Exhibit "3," was not rendered by your house for goods furnished?

A. I don't think it was.

137. What have you to say of Exhibit "4?"

Ans. This looks like our bill-head, and it may be our bill.

138. Will you look at the name John F. Henry, Curran & Co., and see if they are not in the same handwriting?

Ans. I shouldn't think they were; the r's are different; different curves in the Co.

139. Whose handwriting is Exhibit "4" in?

Ans. I can't say positively, but I think it might be my brother Tom's.

140. Where is your brother Tom?

Ans. He is dead.

194 141. Have you any books showing this shipment covered by Exhibit "4?"

Ans. I couldn't find any.

142. Will you look at your sales books covering Sept., '79; June, '80; Sept., '81; February, '82; Sept., '82; March, '82; May, '83; Dec., '83, and report whether in any or all those months you shipped balsam to California?

Ans. Yes.

143. Have you triple sheets showing all your shipments for '83 and '84?

Ans. I couldn't say positively.

144. According to your course of business, have you triple sheets showing all your shipments of balsam during '83 and '84?

Ans. Yes; unless one has been misplaced, lost, or destroyed.

145. Do these triple sheets in every case purport to show to what point the shipment is made?

Ans. Yes; they always show where the goods are shipped.

146. How are they preserved—in what form are they kept?

Ans. They lay around on the desk until everything is checked off as having been shipped, and then they are stuck into a pigeon hole.

147 Is it or not a fact that, according to your course of business, your sales books should show to what point every shipment

195 is made?

Ans. Yes.

148. What is the lowest price at which you have sold this balsam within the past ten years?

Ans. Our price has never been lower than $84 a gross.

149. What is the lowest price that you ever sold any for?

Ans. To my knowledge, nothing has ever been sold — less — $84 a gross.

150. Haven't you sold it to L. N. Smith as low as $77.70 a gross?

Ans. No, sir.

151. In dealing with L. N. Smith in respect to this balsam, were you making sales directly to him or to other parties through him?

Ans. Our sales were all directly to L. N. Smith, as far as I know.

152. Do you mean to say that you sold to him under an agreement that he should pay to you what he received nett, after an allowance by him for freight, without regard to where it was shipped?

Ans. I know of no agreement of any such kind.

153. Well, in settling with him, did he pay you the price charged or were deductions made?

Ans. I don't suppose there was any money passing, except on final settlement; he took our goods and we would take
196 his; he would charge us freight and we would charge him freight.

154. He charged you freight for what goods went from here to Dayton or elsewhere?

Ans. It might have been to Dayton or elsewhere?

155. Now, in dealing with Smith in respect to this balsam, didn't you ship it wherever he directed?

Ans. I couldn't say that I did.

156. Can't you say that your house did?

Ans. No.

157. Don't you know that your house has shipped balsam to Reddington & Co., of California, at the request or upon the order of L. N. Smith?

A. I can't say that I do.

158. Do you know that it hasn't?

Ans. I have no knowledge of it.

159. When will it be convenient for you to permit me to examine your books and look over the triple sheets as to the sale of balsam?

Ans. Most any evening after business hours, or Sunday; Sunday would be the best day.

G. F. PARK.

197 Adjourned until Tuesday afternoon, 5.30 p. m., February 17, 1885.

TUESDAY, *February* 17, 1885.

Taking of testimony resumed according to adjournment, JOHN PRIOR being called.

JOHN PRIOR, being by me first duly cautioned and sworn, deposes and says as follows:

1. State your name, age, and residence.
John Prior; forty-nine years old; Cincinnati, Ohio.
2. Have you ever bought any Wistar's Balsam of John D. Park and Sons, Cincinnati?
Not that I know of.

JOHN PRIOR.

Adjourned until Wednesday morning, February 18, 1885, 10 a. m.

WEDNESDAY, *February* 18, 1885—10 a. m.

Examination resumed according to agreement, J. O'Hara appearing for def'ts.

G. F. PARK continues.

Further taking of testimony adjourned, by consent of all parties, to Friday, Feb'y 20th, 1885, 10 a. m., the witness having failed to produce the books and papers, as directed by a subpœna issued therefor from the U. S. circuit court, S. D. of Ohio, and de-
198 clining to obey said subpœna until he had opportunity to appeal to said court whether he was bound so to do.

FRIDAY, *Feb'ry 20th*, 1885—10 a. m.

Taking of testimony resumed according to agreement.

W. B. GRUBBS, Jr., recalled, testified as follows:

Question. State whether in your hearing Mr. G. F. Park refused to allow Mr. H. A. Morrill to examine the books of the firm of John D. Park and Sons and take memoranda of their sales of balsam.
Ans. I think he did.

W. B. GRUBBS, JR.

Further taking of testimony adjourned until Saturday, 21 Feb'y, 1885, 10 a. m.

SATURDAY, 21 *February*—10 a. m.

Further taking of testimony adjourned until Wednesday, Feb'y 25, 1885, 10 a. m., by consent of all parties.

WEDNESDAY, 25 *February*, 1885—10 a. m.

Further taking of testimony adjourned until Thursday, M'ch 5, '85, 3 p. m., by consent of parties.

THURSDAY, *M'ch* 5, 1885—3 p. m.

Taking of testimony resumed pursuant to agreement.
199 H. A. Morrill, present, for complainants; no one for defendants.

G. F. PARK, recalled, testified as follows:

161. Please look at the book I now submit to you and state what it is, and turn to page 87 and give the notary the third entry thereon—*i. e.*, the one in the name of S. N. Smith & Co.

It is John D. Park and Sons' foreign sales book. On page 87 is the following entry—the third:

S. M. Smith & Co., Dayton, Ohio.

5 gross of Wistar's Balsam, $84 p'r gross	$420 00
Less freight on 1,380 lbs., at $2.65 a hundred	36 60
	$383 40

Shipped Coffin, Reddington & Co., S. F., Cal.

162. What is the date of that entry?
July 22, 1878.
163. Whose handwriting is it in?
I think it's my sister Susie's writing.
164. What do the letters "S. F., Cal.," mean?
I suppose they mean San Francisco, California.
165. Will you turn to page 778 of the same sales book and give the notary the first entry thereon and the date of the entry?

S. N. Smith & Co., Dayton, Ohio.

Sept. 23, 1879. 2 gross Wistar's Balsam, $80 ---------- $160

166. To what point was that shipped?
I couldn't say.
200 167 What was the date of freight to Dayton at that time, approximately, on, say, two gross?
About $1.50 on two gross; about 25c. a hundred.
168. Have you any means by which you can determine to what point this was shipped?
I have not.
169. Please turn to page 725 of the same book and give the entry thereon against Messrs. McKesson & Robbins, so far as the same relates to Wistar's Balsam, and give date of said entry.
169 Ans.—

McKesson & Robbins, New York.

August 27th, 1879. 1 gro. Wistar's Balsam ---------- $84

170 Ques. Was that a New York house at that time?
Yes.
171. S. N. Smith, of Dayton, has testified that there was shipped to Coffin, Reddington & Co., of San Francisco, ten gross of Wistar's Balsam, on or about June 20, 1877, which he states was bought of you for the sum of $776.40. Will you turn to your ledger with S. N. Smith & Co. for 1877 and state whether you find any entry against S. N. Smith & Co. of that date corresponding with said sum?
201 On page 163 I find an account of a charge against S. N. Smith & Co., on June 20, 1877, viz:

"June 20, 1877. Mdse., No. 968; No. 447 ---------- $776 40."

172. Will you look, now, at the credits given to said Smith & Co. as of the same date, or the first credit subsequent to that date?

On June 22, '77, there is credit, by cash, No. 470, $763.46.

Same date. Int., d. b., No. 137, No. 453, $1,294.

173. What connection is there between those two sums, which, added together, amounts to $776.40, and the $776.40 charged against S. N. Smith & Co. on June 20?

It is a settlement of the bill.

174. What books have you that will show the character of this merchandise for which you charge S. N. Smith & Co. $776.40?

I have no book that would show the charge.

175. Where should it appear, according to your course of business?

In the foreign sales books.

176. Where is the freight sales book of that date?

I don't know.

177. Who does know in your concern?

I would be the proper one to know.

178. Where did you last see it?

202 I couldn't state positively, but I think the last time I saw it was when it was in use or soon after—that is, in 1877.

179. Where are your sales books prior to the date of May 11, 1878?

I don't know.

180. When and to what extent have you searched for them since this suit was brought; also, state whether you have seen anything of them or heard anything about them since this suit was brought?

I have neither seen them nor heard of anything about them. I have made a thorough search for them. When this deposition was begun and I was asked for the books I began the search. I have searched all through the building.

181. How long have you been in your present quarters?

We have occupied part of the building we are now in for probably twenty years. The front portion we have occupied since probably 1876 or '77.

182. Have you ascertained whether your father knows anything about these books?

No; I have not. I knew there was no use asking him. I have never even said a word to him about the case. He is getting old, and is easily troubled.

183. How many of these missing sales books are there, about,

203 and what is their general size?

Well, I should think that in the three years, from '75 to '78 (May 11th, '78), there were two—by a reference to the ledger.

184. How do you account for these missing books?

I don't know how to account for it. They may have got misplaced or have got into the waste paper and been sold as old paper.

185. If sold as waste paper, who did the selling?

I don't know.

186. What is the general size and description of these lost books?

Probably 16 (sixteen) inches long, 11 (eleven) inches wide, 3

(three) inches thick, and contain 800 or 900 pages, say about 850 pages.

187. Now don't you think it's probable that these lost books are in your establishment, and that they have not drifted off in the waste paper, as suggested by you?

No; I don't think that they are in our establishment, because if they were I am pretty certain that I could find them.

188. Where did you find those that you did find?

In office, around in third story; have answered this before.

189. Are you willing to make further search for these books in my presence?

204 Yes.

190. You informed my messenger the other day that the sales books covering the period from August 6, '81, to March 2, '82, was missing; when did you last see that book?

I don't remember the exact time, but I think it was about two years ago.

191. What has become of that book and what search have you made for it?

I have searched every place for it. I don't know what became of the book.

192. You think that also has gone out of the establishment?

I am confident it ain't there, for I can't find it; but if there is anything of value in that book which you would wish to examine, or any account which you would like to look at, I think I can produce the papers for most everything.

G. F. PARK.

Adjourned until Friday, M'ch 6th, 3 p. m.

FRIDAY, *M'ch 6th*—3 p. m.

Taking of testimony resumed.

G. F. PARK, recalled, testified as follows:

193. Have you found the papers referred to in your last answer?

I have found the book that I referred to.

205 194. You spoke of certain papers; what did you mean by that?

I meant memorandums, orders, anything that would pertain to it.

195. Have you found any memoranda or orders pertaining to that period?

Yes; I have found some.

196. Are you prepared to produce of them such as relate to the sale of Wistar's Balsam?

Can produce those that I could find.

197. Have you looked for any since your last examination; and, if so, what have you found?

I didn't look.

198. At the close of your last examination I requested you to look for memoranda or entries of certain sales upon the order of S. N. Smith, during the years 1880, '81, '82, and, I think, '83; please

state whether you have done so, and, if so, what you have found and where you found it.

Yes; I have referred to the ledger and I found a charge of mdse. Sept. 14, 1881, $77.70; Jan. 30, 1882, $77.68; Dec. 7th, 1883, $87.

199. Have you any charge on your ledger against Smith on or about Dec. 17, '83?

I don't remember.

200. What were these first two charges—the one Sept. 14,
206 '81, and the other Jan. 30, '82—for; what kind of mdse.?

Two of them have "Wistar's" opposite, indicating Wistar's Balsam. I don't know which two, however.

201. What is the usual charge of freight from here to California per gross on this balsam?

The rate of freight would be about just according to the way it was shipped; if all rail via Northern Pacific, $2.65 a hundred, or about $6.65 per gross; or it could be shipped, I think, by New York and the ocean at about $2.50 cheaper a gross.

202. Which way was this balsam shipped?

I don't know.

203. How was this balsam ordered?

I suppose from S. N. Smith & Co.; I don't know whether by oral or written order.

204. If by written orders, where are these orders?

I suppose if by written order they would be around some place. We could get a duplicate if the order couldn't be found.

205. How can you get a duplicate?

By writing to S. N. Smith & Co., of Dayton.

206. How far back have you got preserved orders for merchandise?

I think our letter files run back to Jan. 1, '82.

207. What guided you in fixing the price you charged S. N. Smith for balsam in connection with these sales in '81, '82, & '83?

I suppose the price was $87 less freight, or $84 less freight. I don't know which it was.

207 208. How did you determine the amount of freight to be deducted?

I suppose we took off whatever he said to take off.

209. In these cases where you charged S. N. Smith between $77 and $78 per gross, as shown by your books, were these lots of balsam shipped to Dayton or elsewhere?

I suppose originally they were shipped to Dayton.

210. Why do you suppose so?

Because I don't remember shipping any to any other points specified in those answers.

211. Do you remember of ever shipping a lot of balsam to Dayton, in connection with which you deducted from $6 to $8 per gross for freight; if so, when and how much?

If he had the goods in Dayton in stock he would notify us to charge him with a gross of Wistar's Balsam less so much freight.

212. In such cases did you not frequently ship directly to points indicated by him in his order, he giving you the amount of freight, such points being other than Dayton?

I don't remember any points besides Dayton that we shipped to on his order.

213. Then, when he sent you orders asking for a deduction of freight in amount corresponding to charges for the Pacific
208 coast you made no inquiries, did you, as to where this balsam was to go?

I don't suppose we did.

214. Didn't you ship to San Francisco the five gross of balsam charged to S. N. Smith, July 22, 1878?

It would be impossible to remember.

215 Then you mean to say, do you, that it's impossible for you to remember the extent to which, if at all, you have shipped balsam on the order of S. N. Smith to California?

I don't remember of making any shipments of this kind.

216. Can't you say that you haven't made any such shipment?

I have made nine, to my knowledge.

217. Can you say that you have not made any such shipments?

I don't know what I have done in the last ten years. I can't re-remember what I have done in the last ten years—what shipments I have made.

218. Didn't you testify in the early stage of this deposition that you frequently shipped balsam to other parties than these to whom you charged it on your sales book, the party to whom you charged it having ordered it?

I believe we have had such transactions.

219. In those cases were you not in the habit of charging the party ordering it less the freight on the balsam to the point
209 where you were directed to ship the goods, the amount of freight being given you by the party ordering the balsam?

If the freight was in their favor they would want it the other way. It was according to the way the freight was.

220. In such cases they told you where they wanted it shipped and the amount of freight they desired deducted, did they not?

I don't remember any of these transactions for some time. There used to be such a custom, rather general, but not so much during the last three or four years.

221. Do you mean to say that in your dealings with S. N. Smith, when he filled a Pacific-coast order for balsam through you, as he testified in his deposition in your presence, that you shipped it to Dayton and then he shipped it to the Pacific coast, or was it shipped direct by you to the Pacific coast?

I don't know.

222. Have you any letters or orders from S. N. Smith or other papers which will throw any further light on this question?

None that I know of.

223. Will you turn again to page 163 of the ledger, covering date of July 22, 1878, and state what entries you find of that date against S. N. Smith?

Of July 22, '78, p. 163, I find—

By mdse., No. 368---------- $383 40

210 224. Did you bring over any of those triple sheets to which you have referred?

I brought a few of them.

225. Please look at sales book covering Dec. 7, 1883, and state what entry you find on page 458 against S. N. Smith & Co.

S. N. Smith & Co., Dayton, Ohio, 1 gross Wistar's Balsam, $87, less freight.

226. Please make a note of that and look in your ledger to see what charge is made against him there.

All right.

227. Also see what charge you have, if any, against S. N. Smith on your ledger on or about May 16th, 1883, March 5th, 1883, and January 19, 1883.

All right, I'll do it.

228. Now, will you look at your sales book covering Sep. 7, 1882, p. 45, and see what entry you have, if any, against S. N. Smith & Co.

S. N. Smith & Co., Dayton, Ohio.

1 gros- Wistar's Bals., $87, less fr'ght, 2.70, @ $3.45, $9.32 -- $77 68

229. Will you look at your sales book covering Apr. 9, 1880, p. 370, and report what charge you have there against Frank Richardson & Co., of Philadelphia; also on page 600 of sales book, covering Jan. 19, 1883, and page 5 of sales book, covering M'ch 5,

211 1883, and page 400 of sales book, covering May 16, 1883, and report what entries, if any, you find there against S. N. Smith; and also at sales book, covering Jan. 1, 1880, Dec. 17, 1883, and April 1, 1883, and see what charges you have against said Smith for balsam on or about these dates; and also produce the ledger of John D. Park for '74, '75.

Yes; I'll look them up.

G. F. PARK.

Further taking of testimony was at this point adjourned until Tuesday, March 10, 1885, 3 p. m., by consent of parties.

TUESDAY, *March* 10, 1885—3 p. m.

Taking of testimony resumed according to adjournment.

H. A. Morrill, present for complainants; no one present for defendants.

G. A. PARK, recalled, testified as follows:

230. Please state whether, as requested, you looked at your ledger of '83 to see what charge, if any, you have of Dec. 7 against S. N. Smith & Co.

I had no such memorandum; haven't looked at such date, and haven't the ledger here.

231. Please state what memoranda you have looked up, as requested, and give the result of your investigations.

212 Ans. On ledger, June 19, 1883, S. N. Smith ------- $175 00

On ledger, May 17th, '83, by mdse., $78.37 ------- 78 37

March 5, '83, by mdse. ---------- 87 00

232. Have you any books or papers showing what this merchandise was or where it was shipped?

Ans. The sales books will show what it was.

233. Look at the sales book of Jan. 19, '83, and see what charges you find against S. N. Smith for balsam.

Ans. 1 gross Wistar's Balsam, $87.00.

234. State whether you have examined the sales books as requested, and with what result.

I examined the sales books, so far as they were in my possession, with following results:

S. N. Smith & Co., Dayton (charged with).

M'ch 5, '83.	1 gross of Wistar's Balsam	$87 00

S. N. Smith & Co., Dayton (charged with).

May 16, '83.	1 gross Wistar's Balsam	$87 00
	Less freight	8 63

235. Have you examined to find what letter-press copies of letters you have touching the sale of balsam?

No, sir.

213 236. How far back have you in your possession letter-press copies of your correspondence?

I don't know.

237. In the triple sheets you brought here the other day covering '83 & '84 apparently they did not run along consecutively, but some of them are missing. What has become of these?

I only brought the triple sheets covering the shipments of Wistar's Balsam. The other I did not bring.

238. In answer to question No. 211, in speaking of S. N. Smith, you say, "If he had goods in Dayton in stock he would notify us to charge him with a gross of Wistar's Balsam, less so much freight." How long did you keep it in stock that way, subject to such an arrangement as to charges and freight?

I don't know how long it has been, when it began, or when it ended.

239. Who made the arrangement with Smith whereby he kept this in stock for you and for which you charged him, when it was shipped, the price he got for it, less freight, as you have testified?

I made a couple of shipments on my own responsibility to him. There was no charge against him when made. There was just simply a memorandum. We kept the stock then of Wistar's Balsam and "Yellow Dock" for our own convenience in shipping.

214 240. Where was it that you kept this stock there, for how long a time, and in what quantities?

We had stock there, I suppose, at different times in the past—six or seven years; I don't remember how long, and I don't remember the quantities, and I have no way of telling, as the memoranda were destroyed as soon as the shipments were closed; it was all within the past ten years.

241. What was the mode by which you made these shipments from Dayton, who attended to it, and how?

He would ship—*i. e.*, S. N. Smith.

242. Did he ship it on orders sent to you or sent directly to him?

If we wanted any shipped to a certain point we would notify him and charge the goods to the party to whom shipped, and when he made a shipment I suppose he would have an order for it, and we knew nothing of it.

243. If you charged them to the party to whom they were shipped, how did you adjust the matter with Smith, who had these goods of yours?

Why, all the goods that were short were charged to him.

244. Supposing he had in stock 10 gross of balsam belong-
215 ing to you and he shipped 5 gross to parties to whom you directed him to ship it, what account was made between you and him touching these five gross that he had shipped at your request?

He would have no account to render to us.

245. Did you pay him a commission for these shipments?

No; we would forward and ship goods for him, and "honors were easy."

246. Supposing he shipped these goods upon orders sent him direct, what accounts were made between you and him?

If he used any of the goods he would notify us, and we would charge him.

247. How much balsam have you in stock there now?

I don't think there is any.

248. About how much, approximately, were you in the habit of sending him at a time?

I don't remember.

249. Did you send him as many as 10 gross at a time?

I don't remember.

250. Did you send him as many as five gross at any one time?

I don't remember.

251. Did you ever send him as many as twenty gross at any one time?

I don't remember anything about how much there was.

216 252. May you at times have had as many as 20 gross of Wistar's Balsam in the hands of S. N. Smith?

I couldn't say; I don't remember.

253. Have you any books or papers which will enable you to answer the above questions more definitely?

No, sir.

254. Is there anybody in your house that knows anything more about this matter than you represent yourself to know about it?

There is nobody that knows anything but myself, as I was shipping clerk and kept the memorandums.

255. Will your ledger show all the balsam that Smith has had in stock for you during the past two years?

No; they will not.

256. Will your sales books?

No.

257. When the amount which he had in stock became short, as you have expressed it, by reason of Smith's filling orders to him out of it, on what book did you charge him with this shortage?

On the sales book.

—. Would any of those charges be first made on the ledger or day book?

No.

217 258. When would these sales by him be reported to you; when they were made or periodically?

Either way it might be.

259. Then it is not correct, is it, that the entries in the sales books are made up from the triple sheets in all cases?

The triple sheets have nothing to do with the entries to the sales books.

260. What are the entries in the sales books made up from—the orders?

From written orders and verbal orders.

261. Do you find any entry in Feb'y, 81, of merchandise against McKesson & Robbins, of New York, in ledger?

Yes. By mdse., $81.75.

262. Do you know what it was for?

I do not.

263. Have you looked to see whether your firm received any letters from Fowle and Sons in March 12, '77, and July 12, '78.

No.

G. F. PARK.

218 At this point further taking of testimony was adjourned until Friday, 13 March, 1885, 3 p. m., by consent of parties.

FRIDAY, 13 *March*, 1885—3 p. m.

Taking of testimony resumed.

H. A. Morrill present for complainants; no one for defendants.

264. Will you look at Exhibits "1," "2," "3," and "4," attached to depositions filed in this cause Dec. 15, 1884, taken by complainants in New York, and state what these exhibits are?

Ans. They are bills; one, John D. Park's, and three, John D. Park and Son's.

265. State whether you have any entries in your ledger which throw any light on the question whether you furnished goods named therein; and, if so, give the entries.

Ans. Yes; I find the following in the ledger: Aug. 19, '75, to mdse., John F. Henry, Curran & Co., of New York, $420.00; July 12, '76, to mdse., John F. Henry, Curran & Co., of New York, $123.50; Sept. 25, '76, to mdse., John F. Henry, Curran & Co., of New York, 529.27.

266. These entries correspond in amount and date, do they not, to the bills referred to, marked as Exhibits "1," "3," and "4?"

—. Yes.

219 267. What do you know about Exhibit "2?"

Ans. It's our bill; it's William Gilmore's (our entry clerk

at that time) writing; this entry is undoubtedly on the ledger of John D. Park of that date, but I haven't that ledger before me.

268. Have you recently examined the ledger last referred to with reference to ascertaining whether it throws any light on this controversy?

—. No, sir.

269. I see that within the past ten years your sales books show a great many transactions in connection with Wistar's Balsam with Meyers Bros. and Richardson & Co., of St. Louis. Was this in all cases shipped directly to them, and what were their relations to your house in the transactions?

Ans. It was all shipped either directly to them (I mean Meyers Bros. in St. Louis) or to their branch house in Kansas City or Fort Wayne, Ind.; as to Richardson and Co., it was all shipped directly to them.

Their relations were that they bought our goods of us and paid us for them at the regular rates—less freight.

G. F. PARK.

At this point further taking of testimony was adjourned,
220 by consent of parties, until Thursday, March 27, 10 a. m.

TUESDAY, *March* 31*st*, 1885—3 p. m.

Further taking of testimony resumed according to agreement.

Present: H. A. Morrill for pl't'fs; no one for def'ts.

G. F. PARK, recalled, testified as follows:

270. Will you look at sales book covering September, 1883, p. 155, under date September 28, '83, and see what charge you have against J. Bradfield, Atlanta, Ga., for sale to him of Wistar's Balsam?

Ans. J. Bradfield, Atlanta, Ga.: 1½ gross of Wistar's Balsam, $43.50.

271. What does that entry indicate?

Ans. It indicates that we have billed Bradfield a half a gross of Wistar.

272. To whom was it shipped?

Ans. I don't know.

273. Then it is not correct, as you have before stated, that the copies on the sales books indicate the parties to whom shipments were made?

221 —. I haven't denied it yet.

274. According to your course of business and book-keeping, what, if anything, does this entry indicate as to whom this shipment was made?

—. The supposition is that it was made to Bradfield.

275. Please look at page 719 of the same book and state whether there is any entry there against Howard and Chandler, under date of February 5, 1884; and, if so, please give the whole entry.

Ans. Yes; there is this entry: Howard & Chandler, Atlanta, Georgia: 2 doz. Wistar's Balsam, $14.50, with some other items in same entry of different goods.

276. Please look at sales book, 1879, p. 43, under date Nov. 25, 1879, and see what entry, if any, you have against Peacock and Bates; and, if any, give it.

Ans. Peacock & Bates, Atlanta, Ga.: ½ doz. Wistar's Balsam, $3.68.

277. To whom do the last two entries referred to show this balsam to have been shipped?

Ans. It is supposed from the nature of the entries that the
222 last has been shipped to Peacock & Bates—the previous one to Howard and Chandler, both of Atlanta, Ga.

278. I notice the letters "A. R. P.," in connection with this last entry; what does that indicate?

"A. R. P.;" that indicates A. R. Park.

279. Who is "A. R. Park," and what do the initials of A. R. Park in this connection indicate?

Ans. A. R. Park is my brother and I suppose one of the defendants herein. His initials here indicate, I guess, that he sold the goods.

280. Please turn to page 432 of the same book, under date of May 11, 1880, and give the entry, if any you find there, against Hunt, Rankin and Lamar.

Ans. I find this entry:

Hunt, Rempkin & Lamar, Atlanta, Georgia.

½ gross Wistar's Balsam ---------- ---------- 43 50

A. R. P.

281. Do the initials "A. R. P." in this entry indicate the same that you said they did in the previous entry?

Ans. Yes.

282. Turn to page 530, in same volume, under date July 1, 1880, and state what entry you find, if any, in connection with S. N. Smith & Co. and Coffin, Reddington & Co., describing in full the entry, if any.

223 Ans. I find a charge against S. N. Smith & Co. of one gross of Wistar's Balsam—$87.00—less freight, 2.65, @ 3.45,= 9.14

$77.86

283. State whether you find the words "Coffin, Reddington & Co., New York," in connection with said entry; and, if so, where they are as connected with the name of S. N. Smith & Co., and what, if anything, has been done to these words.

Ans. There is no connection. I won't go any farther until our attorney is present. I say no; that I do not find the words "Coffin, Reddington & Co., New York," in connection with said entry.

284. State whether the words "S. N. Smith" are on the same line with the description of the goods sold or on the line above.

Ans. They are on the line above.

285. What name do you find opposite the description of the goods?

Ans. I find that the entry clerk has made an error and erased one

name. The name which he has erased is "Coffin, Reddington & Co., New York city."

286. Which name appears to have been written first—Coffin, Reddington & Co. or S. N. Smith and Co.?

Ans. Coffin, Reddington & Co.

224 287. Then, if I understand you, this balsam appears to have been first entered against Coffin, Reddington & Co., of New York. and then that this name was erased and the name of S. N. Smith inserted above it; is that correct?

No.

288. What am I to understand, then, about the matter?

Ans. My version of the affair would be that she—whoever was the entry clerk—had written "Coffin, Reddington & Co.," and, finding that she had nothing to charge against Coffin, Reddington & Co., New York, had utilized the space by making a charge against S. N. Smith.

289. State in whose handwriting "Coffin, Reddington & Co., New York, 1 gross Wistar's Balsam," is.

Ans. I won't answer the question in that shape.

290. In whose handwriting is this entry?

Ans. I suppose it is in the entry clerk's handwriting.

291. Who was that?

Ans. I think it was S. R. Park—*i. e.*, Susan R. Park, my sister.

292. Were the words "S. N. Smith & Co." and "Coffin, Reddington and Co., New York," written by the same hand?

Ans. They may have been; I couldn't say positively.

225 293. Will you look at the words "S. N. Smith & Co." and state whether or not these words appear to you to have been written at a later date, with different ink, and by a different hand, one or all, from the rest of this entry?

Ans. They appear, as far as I can see, to have been written at the same date, and if they haven't been written by the same party I don't recognize the hand.

Counsel for complainants requests the notary to make, as near as possible, an exact copy of the entry in question as a part of this deposition.

In pursuance of which request the notary hereto attaches such copy as follows:

530.	"CINCINNATI, O, *July* 1, 1880.	
S. W. Smith & Co.	(6 other entries. Chas. M. Hepburn.)	
Coffin, Reddington & Co.,	1 gro. Wistar's Balsam----------	87 00
New York.*	Less fr'ht, 2.65, @ 3.45 ----------	9 14
2330–670.		77 86

294. Please look on page 370 of this same book, under date of April 9, 1880, and give any entry you may find there against French, Richards & Co.

* Erased in original.

Ans. I find this entry:

French, Richards & Co., Philadelphia.

½ gross Wistar's Balsam ---------- $84

295. To whom does this appear to have been shipped, so far as indicated by the entry?

Ans. To French, Richards & Co., Philadelphia.

226 296. Have you, since your examination here was commenced, examined your letter copy-books to see what correspondence, if any, you have had with S. N. Smith during the past ten years in regard to transactions with him relating to Wistar's Balsam?

Ans. I have not.

297. How far back have you letter-press copies of your letters?

Ans. I haven't the slightest idea.

298. Who of your firm could answer that question?

—. Nobody, without looking.

299. Are these letter copy-books indexed so that one could readily get at correspondence copied therein with any particular party?

Ans. I suppose they are.

300. Are you willing that I shall examine them so far as they relate to correspondence, if any, with S. N. Smith and with Coffin, Reddington & Co.?

Ans. I can't say; I don't know what's in them. There may be private correspondent- which we wouldn't want anybody to see. Such entries do not pertain to Wistar's Balsam, though.

227 301. Are you willing that I shall see such correspondence as relates to Wistar's Balsam during the last ten years with the parties named?

Ans. If there is any?

302. Will you search to see whether there is any?

Ans. Yes.

303. How soon can I call to ascertain what the result is?

Ans. On Friday next.

304. Have you ever had any account of any kind on your ledger or sales book with Crane and Bingham, of San Francisco, Cal.?

Ans. I don't remember of any.

G. F. PARK.

Hereupon it was announced by Mr. Morrill, of counsel for complainants, that the examination-in-chief of Mr. G. F. Park was closed.

By consent of parties, and at the request of counsel for defendants, further taking of testimony herein is adjourned until Tuesday, June 2, 1885, to give counsel for defendants opportunity to decide whether they would cross-examine.

228 TUESDAY, *June* 2, 1885.

It is announced by counsel for defendants that they will not cross-examine Mr. G. F. Park or other witnesses herein testifying.

Certificate.

I, Chas. M. Hepburn, a notary public in and for the county of Hamilton and State of Ohio, do hereby certify that Stephen M. McKenzie, Godfrey F. Park, W. B. Grubbs, Jr., and John Prior, witnesses who have testified in the foregoing deposition-, were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth; that the depositions by them respectively subscribed, as above set forth, were reduced to writing by myself and by no other persons in the presence of the witnesses respectively and were respectively subscribed by the said witnesses in my presence, and were taken at the time and place in the annexed — specified,
229 and were continued from day to day, as above set forth, or adjourned, as above stated, at the consent of the parties; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of the suit.

In testimony whereof I have hereunto set my hand and official seal this 2nd day of June, 1885.

[SEAL.] CHAS. M. HEPBURN,
Notary Public in and for Hamilton Co., Ohio.

230 EXHIBIT "A."

Cincinnati, Hamilton & Dayton, Dayton & Michigan, Cincinnati, Richmond & Chicago, and Cincinnati, Hamilton and Indianapolis Railroad Co's' freight contract.

CINCINNATI, O., *June* 2, 1883.

Received from J. N. Harris & Co. (Limited), at the depot of the Cincinnati, Hamilton and Dayton Railroad Company, the following packages (contents unknown) in apparently good order:

Marks, consignee, &c.	Articles.	Weight (subject to correction).
Kirk, Geary & Co., Sacramento, Cal.	6 boxes Wistar's Balsam.	260 lbs.

Fowles *vs.* Park. Exhibit "A." Chas. M. Hepburn, notary.

To Sacramento via —— ——.
(Signed) ARMSTRONG.

In cents per hundred pounds.

1st class.	2nd class.	3rd class.	4th class.	Special.
3.45.				

H. COOPER, *Agent.*

231 EXHIBIT "B." Chas. M. Hepburn.

FOWLE *vs.* PARK.

J. N. Harris, chairman; T. H. C. Allen, treasurer; S. M. McKenzie, secretary.

CINCINNATI, *June* 2, 1883.

Messrs. Kirk, Geary & Co., bought of I. N. Harris & Co., Limited, proprietors for the Western and Southern States of Perry Davis' Vegetable Pain-Killer, Dr. Weaver's Canker and Salt Rheum Syrup and Cerate, and Dr. Richardson's Sherry Wine Bitters; also sole proprietors of Allen's Lung Balsam, and general agents for Fellows' Compound Syrup of Hypophosphites.

Terms cash.
Office, No. 111 Sycamore street, below Fourth.

6 boxes, 1 gross, Wistar's Balsam of Wild Cherry---------- $87 00

232 And afterward, to wit, on the 9th day of June, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause clothed in the words and figures following, to wit:

Journal Entry W, 129.

SETH A. FOWLE and HORACE S. FOWLE, Partners, &c.,
vs.
JOHN D. PARK & SONS. } In Equity. 3624.

Upon application therefor and consent of the parties hereto the time for taking testimony herein, as prescribed by the rules of practice governing such cases, is hereby extended so as to allow the complainants forty days from the entry hereof within which to complete the taking of their testimony and allowing the defendants sixty days from the expiration of said forty days within which to take their testimony, said parties defendant agreeing, in connection with this entry, to waive all objections to complainants' testimony heretofore taken arising from its not having been taken within the time prescribed by said rules.

And afterward, to wit, on the 25th day of July, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause clothed in the following words and figures, to wit:

Journal Entry W, 159.

SETH A. FOWLE and HORACE S. FOWLE, Partners, &c.,
vs.
JOHN D. PARK & SONS. } In Equity. 3624.

233 Upon application therefor and consent of parties hereto the time for taking testimony herein is hereby extended for

the period of twenty day- from the expiration of the time heretofore granted herein, and the defendants are allowed sixty days from the expiration of said twenty days within which to complete the taking of their testimony.

And afterward, to wit, on the 5th day of August, in the year last aforesaid, came the complainants herein aforesaid, by their said solicitors, and filed in the clerk's office of the court aforesaid in this cause certain depositions theretofore taken on their behalf herein clothed in the following words and figures, to wit:

234 *Complainants' Testimony. Deposition of Seth A. Fowle.*

STATE OF OHIO, } ss:
Hamilton County, }

Case No. 3624, Pending in Circuit Court of U. S., S. D. of Ohio. In Equity.

SETH A. FOWLE & HORACE S. FOWLE, Partners as Seth W. Fowle & Sons, Plaintiff-,

vs.

JOHN D. PARK, AMBRO R. PARK, & GODFREY F. PARK, Partners as John D. Park and Sons, Defendant-.

The above-named defendants will take notice that on Tuesday, the 28th day of July, A. D. 1885, the complainants above named will take the depositions of Seth A. Fowle and Horace S. Fowle, complainants, and of sundry other witnesses, to be used as evidence in the trial of the above cause, at the law office of Chas. H. Swan, Esq., 82 Devonshire street, Boston, in the county of Suffolk, in the State of Mass., between the hours of nine o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day between the same hours until they are completed.

235 Service of the above notice is acknowledged and proof of the official character of the officer before whom the said depositions may be taken is by agreement waived; also all exceptions as to time.

Done this 18th day of July, 1885.

McGUFFEY & MORRILL,
Attorneys for Complainants.
O'HARA & BRYAN,
Attorneys for Defendants.

236 COVINGTON, KY., *Dec.* 15, 1885.

Room- 15 and 16.

Messrs. McGuffey & Morrill, att'ys S. A. Fowle & Son.

GENTS: I will make no objection in the case of Fowle *v.* Park & Sons, in U. S. cir. c't, S. D. Ohio, to the use of the copies of exhibits referred to in the depositions of Seth A. Fowle, taken on behalf of

complainants, instead of the original, and waive all formalities of the proofs thereof, but shall insist on my exception to their competency as evidence in the cause.

Yours,

J. O'HARA,
Att'y for Park & Son.

237 Circuit Court of the United States, So. Dist. of Ohio. In Equity.

S. A. FOWLE *et al. v.* JOHN D. PARK *et al.*

BOSTON, *July* 28, 1885.

It is hereby stipulated and agreed that testimony taken in the above-entitled case at the office of Robert D. Smith, Esq., may be used with the same force and effect as though the same had been taken at the office of Charles H. Swan, in accordance with the terms of the notice served on def'ts' attorneys.

It is also agreed that the complainants need not call the attesting witnesses to the release and lease produced by Seth A. Fowle; and defendants' counsel admits the due execution of the same.

ROBERT D. SMITH,
For Compl'ts, S. A. Fowle et al.
CHAS. HOUGHTON,
For Def't-, John D. Park et al.

238 Deposition of Seth A. Fowle, taken before me, Charles H. Swan, a United States commissioner within and for the district of Massachusetts, pursuant to the annexed notice and agreement, at the time and place therein specified, to be read in evidence in behalf of plaintiffs in the cause of Seth A. Fowle *et al. v.* John D. Park *et al.*, in equity, now pending in the circuit court of the United States for the southern district of Ohio, in which Seth A. Fowle and Horace S. Fowle are plaintiffs and John D. Park, Ambro R. Park, and Godfrey F. Park are defendants, Robert D. Smith, Esq., being present on behalf of plaintiffs, and Charles Houghton, Esq., on behalf of defendants.

SETH A. FOWLE, of lawful age, being by me first duly cautioned and solemnly sworn, deposes and says as follows:

239 *Deposition of Seth A. Fowle.*

BOSTON, *July 28th*, 1885.

Direct examination by ROBERT D. SMITH, Esq., of counsel for complainants:

1. State your name, age, residence, and occupation.

A. Seth A. Fowle; I am 45 years old; I reside in Boston, and manufacture medicines.

2. What is the name of your firm, who are the partners thereof, and how long has that firm been in business?

A. Seth W. Fowle & Sons; Seth A. and Horace S. Fowle; the firm has been in business under that name since January 1, 1871.

3. To what firm or firms did that firm succeed; how long have you been connected with that firm or its predecessors?

(Objected to by counsel for def'ts as immaterial.)

A. It succeeded the firm of Seth W. Fowle and Son. I have been connected with the two firms since April 1, 1885. Previous to that the business was carried on by Seth W. Fowle. I went into the store as a boy, in 1856, and have been in the business ever since.

4. Who was Seth W. Fowle—I mean what relation was he to you?

(Objected to by counsel for def'ts as immaterial.)

240 A. He was my father, and commenced in this business in 1845.

5. Who is Horace S. Fowle, and how long has he been connected with the business?

(Objected to by counsel for def'ts as immaterial.)

A. He is my brother, and became a nominal partner Jan'y 1, 1871, when the firm name was changed from Seth W. Fowle & Son to Seth W. Fowle and Sons, and has been a full partner since July 2, 1872.

6. When did your father die and what next of kin did he leave?

(Objected to by counsel for defendant- as immaterial.)

A. He died in 1867, and left a widow and six children. I was appointed administrator of the estate.

7. Are you the Seth A. Fowle described in this certificate from the probate court?

(Objected to by counsel for def'ts as immaterial.)

A. I am.

(The certificate is offered in evidence and marked Exhibit A.)

8. How did your present firm become the owners of this right in controversy—I mean the right to sell under the Butts contract, so-called?

A. After my father's death the business was carried on by my mother, Lucy Ann S. Fowle, and myself, under the
241 same name as before—Seth W. Fowle & Son. My mother's interest continued until June 29, 1872, when she retired, and a new firm was formed, consisting of my brother and myself. My brother had previously been admitted as a nominal partner, Jan'y 2, 1871, when the name was changed from Seth W. Fowle and Son to Seth W. Fowle & Sons. The right to manufacture and sell Wistar's Balsam under the Butts contract has continued from my father down to the present firm as an asset of the different firms.

9. Have you here a copy of a conveyance from Williams to Butts?

A. I have; this is it.

10. What do you know about this copy which you present and wish to have marked?

(Objected to by counsel for def'ts as immaterial.)

A. This is an accurate type-writer copy of a copy which I myself made from the original. The copy I made I have present. I have

compared the two and know the copy which I present to be an accurate copy of the original.

11. What is the condition of the copy which you made from the original and which you hold in your hand?

242 (Objected to by counsel for def'ts as incompetent and immaterial.)

A. It was in our safe at the time of the great Boston fire of 1872. It was in the fire four days and is charred and will be easily broken by handling.

12. I wish you to hand that to the magistrate, to be marked with his initials for identification.

(Defendants object to the admission and identification of that paper, as the paper itself is immaterial and inadmissible as evidence in this case.)

A. I do so.

(The paper is marked with the initials and official title of the magistrate.)

(Complainants offer the type-writer copy referred to in Int. 10 in evidence and it is marked Exhibit B, and defendants object to the same for the reason given in objecting to the charred copy.)

13. How long ago did you make the copy which is charred?

(Objected to by counsel for defendants as immaterial.)

A. There is a memorandum on the paper. I don't remember it; I should say 13 or 14 years ago.

14. Did you make the memorandum on the paper which is charred, and, looking at that memorandum, are you able to

243 tell us when you made that copy?

(Objected to by counsel for def'ts as immaterial.)

A. I did make the memorandum. I made the copy and the memorandum Sept. 20, 1872.

15. Are you ready and willing to produce the charred copy in court upon the hearing of this case?

A. I am.

16. Where has been the copy—I mean the one on the charred paper—ever since it was made—I mean in whose custody?

(Objected to by counsel for def'ts as immaterial.)

A. It has never been out of my custody.

17. What was done with the original paper from which you made that copy which is now on the charred paper?

A. The original paper was sent to me by Isaac Butts, and after being copied was returned to him.

18. Have you a paper between Butts and Fowle; and, if so, will you produce it?

A. I have; and here it is.

19. What is its condition and what has happened to it?

A. It is very badly charred from being in our safe four days at

the time of the great Boston fire in 1872. It cannot be han-
244 dled without injury and possible destruction.

20. Will you hand it, in the envelope which contains it, to the magistrate, allow him to seal it up in said envelope, and write his name across the portion of the envelope where it is sealed, or otherwise endorse and identify it?

A. Here it is.

(Defendants' counsel objects to the admission of the paper in this case, because he does not know what it is, and cannot determine whether it is relevant or pertinent, and because it is irrelevant and incompetent.)

21. Are you ready and willing to produce this instrument, if required, at the trial of this cause?

A. I am.

22. Is that paper witnessed; and, if so, by whom?

A. It is witnessed by Augustus F. Smith.

23. Who was Augustus F. Smith?

A. I don't know.

24. What has become of him?

A. I am told that he is dead.

25. Where did Augustus F. Smith live?

A. I suppose he lived in New York.

26. What makes you suppose that he lived in N. Y.?

A. Mr. Butts lived in N. Y. at the time, and the paper is dated at N. Y.

245 27. Do you know the handwriting of Augustus F. Smith?

A. I do not.

(Defendants' counsel objects to all the above interrogatories and answers relating to Augustus F. Smith as immaterial, irrelevant, and hearsay.)

28. Do you know the handwriting of Isaac Butts and Seth W. Fowle, whose names appear to be signed to that paper; is this paper signed by them or either of them?

A. I am familiar with the handwriting of both, and I recognize the signatures as being the signatures of each party.

29. What is the paper which I now hand you, and which the magistrate will mark Exhibit C?

A. It is a copy of the original agreement between Butts and Fowle, which agreement I just produced. I have carefully compared the copy with the original and know it to be a correct copy.

Counsel for plaintiff offers this copy in evidence as a part of this deposition, being ready to produce the charred original at the trial of this cause.

Counsel for defendants objects to the admission of this paper, purporting to be a copy, as incompetent.

30. Where has this charred original been ever since its date?

246 A. It was in my father's possession until the time of his death. Since then it has always been in my custody.

31. How long and what, to your knowledge, have your father and your firm succeeding him acted and manufactured under that paper?

(Objected to by counsel for def'ts as immaterial.)

A. I know that my father manufactured and sold Wistar's Balsam of Wild Cherry as long ago as I can remember, from frequent visits to the store when I was a boy and seeing it manufactured. I went into the store as a boy in 1856, and it has always been manufactured and sold by my father or the succeeding firms since then.

32. Have the bottles had the same or different labels during that time, and under what labels or inscriptions has Wistar's Balsam of Wild Cherry, prepared by you or your firm, been sold?

(Objected to by counsel for d'f'ts as immaterial and incompetent.)

A. This is a wrapper such as has always been used round the bottles of Wistar's Balsam of Wild Cherry as far back as I can remember. There have been no changes, except changes in the name of the firm and in the address.

(The wrapper produced is offered in evidence and marked
247 Exhibit D. The admission of the paper is objected to by counsel for def'ts as immaterial and incompetent.)

33. How much has your firm spent, if anything, in advertising this Wistar's Balsam of Wild Cherry manufactured by you?

(Objected to as irrelevant and incompetent testimony.)

A. We have spent over three hundred thousand dollars in advertising Wistar's Balsam of Wild Cherry east of the Alleghany Mountains during the last twenty years, an average of fifteen thousand dollars a year—from 1872 to 1884, inclusive, 13 years. We have spent, in addition to this, about twenty-six thousand dollars for advertising the balsam on the Pacific coast.

34. Did your firm at any time make any contract with the firm of John D. Park or John D. Park and Sons, of Cincinnati?

A. Up to 1864 Seth W. Fowle and John D. Park sold Wistar's Balsam on the Pacific coast in competition. In that year an agreement was entered into between these two parties for the transacting of the business in that region on joint account.

35. Have you the original agreement between Seth. W.
248 Fowle and John D. Park? What is its condition?

A. This is the original of that agreement; it is charred and cannot be handled without injury, from having been through the great fire of 1872; it has United States internal revenue stamps on it; it is dated December 17th, 1864.

36. By whom does that paper purport to be witnessed?

A. By J. P. Dinsmore.

37. Where is J. P. Dinsmore?

A. He is in Europe.

38. Do you know his signature?

A. I do. I am very familiar with it.

39. Is that signature in his handwriting?

A. It is.

40. Are the signatures of the consignatory parties known to you?

A. They are.

41. Whose signatures are they?

A. They are the signatures of Seth W. Fowle and John D. Park, with a seal opposite each signature.

42. You said that it was an agreement made in 1864. State exactly how that is.

A. I should have stated that it was an agreement made in 1863, with a supplementary agreement dated Dec. 17, 1864. Instead of 1864, in my answer to interrogatory 34, I should have said 1863.

249 43. Will you place said instrument between Park and Fowle in an envelope, and hand the same to the magistrate, to be treated by him like the agreement between Butts and Fowle?

(Defendants' counsel object to the admission of this paper in this case as incompetent and irrelevant.)

A. I will.

44. Are you ready and willing and will you, if required, produce that instrument at the trial of this cause?

A. I am and will.

45. What is the paper I now hand you?

A. It is a type-writer copy of the same document. I have compared it with the original, and know it to be a correct copy.

(Complainants' counsel offers the said type-writer copy in evidence, and it is marked Exhibit E.

Defendants' counsel objects to the admission of the type-writer copy as evidence as being incompetent and irrelevant.)

46. After the making of that agreement of 1863 and 1864, how was the business to which it related transacted by you or by Park or his firm?

A. The business on the Pacific coast was carried on, under that agreement, until 1869, when it was terminated, and a new agree-

250 ment entered into between John D. Park and Seth A. and Lucy Ann S. Fowle, who then constituted the firm of Seth W. Fowle and Son.

47. By whom were the goods manufactured and shipped to the Pacific coast?

A. They were manufactured by my father or the firm that succeeded him after his death, and all orders from the Pacific coast were filled by us.

48. Who conducted the business on the Pacific coast; who paid for the advertising?

A. The accounts were kept by us and the profits were divided between Mr. Park and our firm. There was very little advertising done at that time. We made all the contracts that were entered into, paid all the bills, and charged the expense to joint account before dividing the profits with Mr. Park.

49. Did Park or Park and Sons have anything to do with the Pacific-coast business after you made the agreement of 1863?

A. One provision of that agreement was that any Wistar's Balsam that was sold outside of that agreement that was known to go to the Pacific coast should be put into joint account. We knew of quite a number of lots of our Wistar's Balsam being sent to the Pacific coast by parties that bought of us. These were, in every case, put into joint account and the profits were divided equally with Park. At first Mr. Park reported a few sales of his balsam, but dur-
251 ing the greater part of the continuance of the contract Mr. Park reported no sales. Except this, Mr. Park had nothing to do with the sales on the Pacific coast.

50. Have you a contract signed by John D. Park, made in 1869?

A. I have. It is in the same condition as the other papers, having been through the same fire.

51. Is that instrument witnessed; and, if so, by whom?

A. It is witnessed by Andrew J. Tully and James S. Austin.

52. Where are Andrew J. Tully and James S. Austin?

A. Andrew J. Tully I know nothing about; James S. Austin is a friend, and resides in Cincinnati. The papers and the consideration were sent to him and the agreement obtained by him. He is still in Cincinnati.

53. Where was the paper executed by Mr. Park, if you know?

A. In Cincinnati.

54. By whom is that paper signed?

A. It is signed by John D. Park.

55. Where and how did you get it?

A. I received it in Boston, from Mr. Austin.

56. Did Mr. Austin personally hand it to you?

A. He did not. It was sent to us either by express or mail.

252 57. Have you ever seen or known any Andrew J. Tully?

A. I have not. I presume he was in Cincinnati at the time, as the paper was executed there.

58. Will you hand the magistrate that paper in an envelope and have it treated by him as he has treated the other charred exhibits?

A. I will. Here it is.

59. Are you ready and willing to produce said paper, if required, at the hearing of this cause?

A. I am.

(The plaintiff- offers all the charred exhibits in evidence and will produce the same at the trial.)

60. Do you know Mr. Austin's signature on the charred paper?

A. I do; I know that it is his signature.

61. Have you prepared an accurate copy of said instrument?

A. I have; this is it. I have examined it and I know it to be a correct copy.

(Complainants offer the said copy in evidence and it is marked Exhibit F. Defendants object to the admission of the copy as evidence in the case as incompetent and immaterial, the original being in evidence.)

62. Since the execution of said paper what has been done in the territory covered by that paper?

253 (Objected to by counsel for defendants.)

A. We have manufactured and sold Wistar's Balsam for that section of the country, and until 1874 we supposed we were free from competition by Park. Up to September, 1875, our price for Wistar's Balsam to the wholesale trade on the Pacific coast was $7.00 per dozen. Our customers paid freight, and the balsam cost them, laid down, about $7.75 per doz. In July, 1875, we were informed by some of our customers in San Francisco that Wistar's Balsam, manufactured by John D. Park, was offered to them at $7.50 per dozen, delivered in San Francisco. We immediately wrote John D. Park and Sons for an explanation. I have before me in my letter book a counter-foil letter-press copy of the letters sent by me to John D. Park. I know that the letter was mailed to them. They must have received it, for our envelopes have a printed request to the posmaster to return the letters if not called for. I see by the date of the letter that I should have said 1878 instead of 1875 above, in both instances where I have given the date 1875, and also where I have said 1874. I annex a copy, which I have carefully compared with this letter.

254 (The copy produced is marked Exhibit G. Defendants object to the admission of the copy as evidence on the ground that it is incompetent and irrelevant.)

Receiving no reply to this letter, August 20th, 1878, we wrote John D. Park & Sons again. I have a letter-press copy of this letter before me. This letter I know was mailed to them in an envelope with a similar imprint to the other. I have a copy here which I have carefully compared with the letter in my letter book, and I know it to be a correct copy.

(The copy is marked Exhibit H. The def'ts object to the copy of this letter as incompetent and irrelevant.)

(Complainants notify the defendants to produce the originals of the letters spoken of.)

During July and August, '78, we continued to receive notice from our customers that Park's Wistar's Balsam was being offered to them in San Francisco at less than our price, and that large shipments of it were being made to that market. They informed us that several parties were pushing Park's article there with considerable zeal. Fearing that an effort was being made by Park or through him to supplant our article in that market with his own, we reduced
255 the price of our balsam to our customers on the Pacific coast to $6.00 per doz. This seemed to us to be the only way in which we could immediately pick up this illegitimate business and retain the business which we had bought of Mr. Park, and to extend which we had spent a large sum of money. This reduction in price was made Sept. 3rd, 1878; from that time until the date of the filing of this bill, March 28, 1884, we sold on the Pacific coast 4,824

dozens, at $6.00 per dozen, the parties paying their own freight. We received for this, therefore, $4,824 less than we should have received if Park had not interfered with the business that we purchased of him. I consider that we have an equitable claim against Park for that amount. Since the filing of this bill we have sold 756 dozen more at this reduced price. The fact of two articles being sold in that market, both claiming to be genuine, is a great injury to the reputation of the article. It creates confusion in the minds of dealers as well as consumers, and many dealers will refuse to keep either. The fact that the competing article is a genuine preparation renders it all the more difficult to stop its sale. Many dealers would not sell a counterfeit article, but, knowing that
256 Park's Wistar's Balsam is prepared from the same recipe as ours they do not hesitate to sell it, particularly if they can buy it cheaper than ours, and thus make a greater profit.

We could denounce a counterfeit as a fraud, but when we urge dealers not to sell Park's Wistar's Balsam they say that it is genuine and we cannot deny it. I consider that our business has been injured from this cause alone to the amount of at least five thousand dollars. This interference by Park has necessitated the incorporating in our advertisements of a caution to purchasers to be sure and get only the Wistar's Balsam prepared by us. This has cost us at least a thousand dollars.

(Counsel for defendants object to all that part of the answer after and including the words "the fact of two articles," because it involves an expression of the witness' opinions and inferences and is argumentative, and also because it is incompetent and irrelevant.)

63. Were the letters which you speak of as having been mailed to Park deposited in the post office postpaid?

A. They were.

64. How were they directed?

A. To John D. Park and Sons, Cincinnati, Ohio.

257 65. Before the death of your father, when you went into partnership with him, did you have any interest with him in the Wistar's Balsam of Wild Cherry?

(Objected to by counsel for defendant as irrelevant.)

A. I did. I had an interest in the Wistar's Balsam of Wild Cherry and the other articles he was manufacturing at the time this partnership was formed, April, 1865. There were no written articles of partnership, but it was agreed between us that I should have an interest in the entire business, including the balsam. We carried on the business together and I continued to share in the profits of the balsam and the other articles until the time of my father's death.

66. What interest did you have in the assets of that firm?

(Objected to as irrelevant by counsel for defendants.)

A. I had one-quarter interest.

67. After the death of your father, did you or did you and your brother acquire from your father's estate or from those who were

interested in his estate the entire title to this Wistar's Balsam of Wild Cherry? State how.

A. We did. As surviving partner and administrator I had the settlement of the affairs of the old concern. I purchased of the heirs the entire assets of the concern with the exception of one-
quarter interest in the franchise or trade-mark of Wistar's
258 Balsam, which one-quarter interest was retained by my mother. My brother and I then formed a partnership for carrying on the business, and we leased of my mother her quarter interest in the balsam.

68. Have you the original papers showing that arrangement?

A. I have the original papers executed by all interested in my father's estate except myself.

69. Do you know all the signatures written opposite the seals, and are they the signatures of the persons whose they purport to be?

A. These are the signatures of all the persons interested in my father's estate, and I know their signatures, and I know these are their signatures.

70. I see this paper is witnesses. Do you know the signatures of the witnesses, and where is each of them?

A. Emmie M. Fowle is my wife; she is at Hull. W. F. Whitcomb is my brother-in-law; he is in the city. E. W. Otis was our book-keeper at that time, and is in or near the city.

71. Have you another paper relating to the title; and, if so, what is it?

A. I have here a lease by Lucy Ann S. Fowle of her one-quarter interest in Wistar's Balsam to Seth A. and Horace S. Fowle.
259 It is signed and sealed by Lucy Ann S. Fowle, Seth A. Fowle, and Horace S. Fowle. I know the signatures of these parties and know that these are their signatures. It is witnessed by the same witnesses as the last document.

(The release and the lease are offered in evidence and are marked for identification by the magistrate with his name and official title. Complainants offer to produce the said papers at the hearing, and now produce copies, to be marked, respectively, I and K, and to be attached to this deposition.)

72. Have you, or have you and your firm, performed all the things which were agreed to be performed by you as the consideration for the purchase of that interest from those interested in your father's estate?

(Objected to as immaterial by counsel for defendants.)

A. We have in every respect.

73. Have you and your firm performed all things which you were bound to do as the consideration for the secured paper that has been spoken of? I mean what you call the lease from your mother.

(Objected to as irrelevant by counsel for defendants.)

A. We have in every respect.

260 74. How many dozen bottles of this article do you manufacture and sell each year?

A. From 1865 to 1884, inclusive, the sales of Wistar's Balsam east of the Alleghany Mountains were 6,600 gross, amounting to $600,000, an average annual sale of 330 gross. From 1870 to 1884, fifteen years, 980 gross, amounting to $80,000, were sold on the Pacific coast, averaging about 65 gross per annum. By Pacific coast I mean west of the Rocky Mountains, but it is all sold in San Francisco, Portland, Oregon, and Sacramento.

Adjourned.

JULY 29TH, 1885.

The witness continues:

We sold on the Pacific coast as follows: In 1868 only 199 dozen, realizing $1,393.00; in 1869 only 222 dozen, realizing $1,554.00. We bought out Park's claim to the Pacific coast in 1869, and immediately commenced advertising, which had been neglected for several years, and our sales increased as follows: In 1870 we sold 500 dozen for $3,500; in 1871 we sold 898 dozen for $6,286. Besides newspaper advertising we distributed circulars, pamphlets, and show-cards on the Pacific coast, and, in various ways, made
261 efforts to increase the sales of the balsam in that locality. In consequence of our extensive advertising and other efforts to increase the sales of the balsam, both on the Pacific coast and east of the Alleghany Mountains, a large demand has been created for the article in both sections, and we have in the trade-mark and good will of Wistar's Balsam of Wild Cherry a valuable property right, which trade-mark is shown in the wrappers which I have already produced, and which is used universally on the Pacific coast and in the East. By this wrapper the balsam is known in both sections as of our manufacture.

75. Can you tell how much you have spent in advertising since 1869 on the Pacific coast?

A. I have already stated how much we have spent since 1872, namely, $26,000, but it is impossible for me to state how much we spent from 1869 to 1872, as our books covering that period were destroyed by fire.

(Question and answer objected to as immaterial by counsel for defendants.)

76. How much is the cost of manufacturing the balsam based upon the experience you have had? I mean per dozen.

(Objected to as immaterial by counsel for defendants.)

262 A. During the past ten years it has been $1.75 per dozen.

77. This is for a dozen bottles of what size? Does it include wrapper and boxing?

(Objected to as immaterial by counsel for defendants.)

A. This is for the $1.00 size only. It includes materials, labels, wrappers, bottles, boxes, and labor; also rent and insurance.

78. How much does a bottle of the dollar size contain of Wistar's Balsam of Wild Cherry?

(Objected to as immaterial by counsel for def'ts.)

A. It contains ten fluid ounces without filling the neck, and, so far as I know, has always contained the same quantity.

79. What is the average price per dozen that you receive?

(Objected to as immaterial by counsel for defendants.)

A. $7.20 per dozen net, cash, for the dollar size.

80. Have you ever sold any of the balsam on the territory which, under these instruments, belongs to Mr. Park?

A. We have never sold a single bottle on that territory so long as I have been in business. We have occasionally received orders
263 for the balsam in that territory, and have always either sent the orders to Mr. Park or written the parties that we had no right to sell to them. We have never sold in that region, directly or indirectly. We have never, during the 29 years that I have been in the business, received an order from Mr. Park that had been sent to him from our territory.

81. Have you ever sold any smaller-sized bottles of balsam? If so, state since what time; the contents of such bottles and price; where sold, and any other circumstances attending their manufacture and sale.

(Objected to by counsel for defendants as immaterial.)

A. Since 1874 we have put up the balsam in a bottle containing exactly four fluid ounces without filling the neck, which bottle has been sold at retail for fifty cents. We have received for this size $3.60 per dozen net, cash, which would be at the rate of $9.00 per dozen for a bottle holding ten ounces. These bottles have been sold exclusively on our territory. We have never received an order for this size from the territory to which Mr. Park has exclusive right, and have never sold a bottle, directly or indirectly, on his territory.

264 82. State whether Mr. Park has known of your sale of the balsam in small bottles, and state the circumstances concerning the same.

A. Mr. Park was fully informed of the fact that we were putting up this small-sized bottle, and has has never made any protest whatever. Here is a letter dated March 8, 1877, which we received from him.

(The letter is produced and marked Exhibit L.)

I have a letter-press copy of our reply to that letter, dated March 12, 1877.

Complainants' counsel notifies defendants' counsel to produce the original of said letter at the hearing. Complainants offer a copy of said letter-press copy in evidence, to be marked Exhibit M, and defendants object to said letter and the copy thereof as immaterial. This letter was enclosed in an envelope bearing a printed request to return to us if not called for, addressed to John D. Park and Sons, Cincinnati, Ohio. It was properly stamped and deposited in the post office. I have a letter-press copy of another letter written to Park and Sons, dated June 1, 1877.

264½ (Complainants' counsel notifies def'ts' counsel to produce the original of this letter at the hearing and offers in evidence a copy of said letter-press copy, to be marked Exhibit N. Def'ts' counsel objects to the letter and the copy as immaterial.)

This letter was enclosed in an envelope bearing a printed request to return to us if not called for, addressed to John D. Park and Sons, Cincinnati, Ohio. It was properly stamped and deposited in the post office.

83. Which, if either, of the defendants is here present with Mr. Houghton, the opposing counsel; and have you ever had any conversation with him before the beginning of this suit?

A. Mr. G. F. Park is here present. I never had any conversation with him before the beginning of this suit.

84. Did you have any conversation with Ambro R. Park before the beginning of this suit?

A. In 1877, when I was in Cincinnati, I had a conversation with Mr. Ambro R. Park and protested against their selling their Wistar's Balsam east of the Alleghany Mountains. I had no idea of the extent of the sales of their balsam in the East until after the beginning of this suit.

265 85. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If you — set forth the same fully and at large in your answer.

A. I have been asked for a statement in detail of our sales during the last ten years. I will prepare such a statement and hand it to the magistrate, to be annexed to this testimony and marked Exhibit O. I can think of nothing further to add to this deposition.

(Defendants' counsel objects to this statement as immaterial.)

Cross-examination by CHARLES HOUGHTON, Esq., of counsel for defendants:

86. Who are now all the proprietors of the right, title, and interest in Wistar's Balsam of Wild Cherry that Seth W. Fowle derived from Butts?

A. Seth A. and Horace S. Fowle, we having purchased of Lucy Ann S. Fowle her interest since the commencement of this suit.

87. What was the extent of the interest of Lucy Ann S. Fowle at the time of the commencement of this suit?

266 A. She had a one-quarter interest in the franchise or trademark of Wistar's Balsam of Wild Cherry, which she leased to Seth A. and Horace S. Fowle.

88. When did Seth A. and Horace S. Fowle purchase that quarter interest of Mrs. Fowle?

A. About January 1, 1885.

89. How much was paid to Mrs. Fowle for that quarter interest, or agreed to be paid?

A. Four thousand dollars, which was the value fixed on it at the

time of my father's death, when the business was very small. This was considered an equitable sum, because Mrs. Fowle had contributed neither capital nor service during the past eighteen years towards increasing the value of the property.

90. Was there any paper or writing passed between Mrs. Fowle and you indicating the sale?

A. There was; here it is.

91. What is the date of that paper?

A. December 31st, 1884.

92. Was the consideration mentioned in that paper—$4,000—paid to Mrs. Fowle?

A. It was.

93. State how and in what manner it was paid.

A. By a note, payable on demand.

94. Can you give the terms, promises, and conditions of that note from memory?

267 A. The amount was $4,000. The interest is $400 per annum, payable quarterly.

95. What was the reason of making this assignment of this interest from Mrs. Fowle to Seth A. and Horace S. Fowle?

A. So that in case of my mother's death we should have a clear title to Wistar's Balsam and not have to deal with her heirs. She was perfectly willing to sell it to us at this price, intending to make a will leaving her other property to my sisters.

96. Was there an understanding that she was to hold this note and draw the interest on it during her life?

A. There was a verbal understanding to that effect.

97. What was the disposition that was to be made of the note at her decease?

A. There has been no understanding or agreement in regard to it.

98. You have said in answer to No. 95: "She was perfectly willing to sell to us at this price, intending to make a will leaving her other property to my sisters." If she was to leave her other property to your sisters what was to be done with this note at her decease?

A. I don't know what she would do with it.

99. Did you not or do you not now expect that it would be returned to you after her decease?

268 A. I do not; I expect that we should have to pay it.

100. Were you advised by counsel in this suit or otherwise to have this assignment from Mrs. Fowle to be made?

A. We were not. No one had anything whatever to do with it except my mother, my brother, and myself. No other parties had any knowledge of the transaction until it had been made. It was a *bona fide* sale, and would have been made if this suit had not been pending.

101. Were you not informed before this assignment was made that Mrs. Fowle would have to be made a party plaintiff to this suit, she being a joint owner with you and Horace S. Fowle?

A. We were not.

102. Did you not know that such was the fact?

A. I did not.

102. In Ans. to Int. 49 you say that one provision of that agreement, referring to the agreement of 1863, mentioned, was that "any Wistar's Balsam sold outside of that agreement," &c.; was that agreement put in evidence?

A. It was.

104. Will you be good enough to point out in that copy the provision you refer to and read it.

269 A. "Any Wistar's Balsam made either by said Fowle or said Park that has been shipped to the Pacific coast since April, 1863, or that may hereafter be sent there by any party, shall be put into this account at $2.25 per dozen."

105. In your arrangements with the defendants in regard to the sales of balsam you agreed with them, if I understand your answers correctly, not to sell the balsam for less than $7.20 per dozen, did you not?

(Objected to by counsel for compl'ts so far as shown by writings.)

A. We did not make any such agreement; there was no restriction in regard to the price at which we should sell.

106. Do you mean to say that you were at liberty to sell it at any price that you chose to in competition with the defendants?

A. Our only agreements with the def'ts were in regard to the Pacific coast; we have a perfect right to sell there at any price we please and have had such right since 1869.

107. How was it before 1869?

(Objected to by compl'ts' counsel that it is a question of law.)

A. While the contract of 1863–'4 was in force we sold at whatever price was agreed upon by Mr. Park and Seth W. Fowle.

270 108. Will you look at your contract of *of* 1863–'4 and read to the examiner the clause which I point out to you?

A. I am looking at the contract and read from it as requested: "The price of the balsam delivered on the Pacific coast shall be $7 per dozen in coin, six months from date of shipment in Boston."

109. Did you at any time vary the price from the sum stated in that agreement; and, if so, when and what was the variation?

A. I have every reason to believe that we in no case sold for less than $7.00 per dozen.

110. In your Ans. to Int. 62 you say that you reduced the price of balsam to our customers on the Pacific coast to $6 per dozen. Is your last answer consistent with that or not?

A. It is, perfectly. My last answer related to the time when business was being done under the 1863–'4 contract. We reduced the price to $6 per dozen after we had purchased Park's claim to the Pacific coast by the 1869 contract.

111. Why did you put the price down to $6 Sept. 3rd, 1878?

A. It was an act of self-preservation; to stop any further
271 shipments of Park's Wistar's Balsam to that market, believing that if our article could be sold there at a less price than Park's was being sold at dealers would stop ordering Park's.

112. Did you know at that time of your own knowledge that Park's Balsam was sold on the Pacific coast?

A. Only as we learned by letters received from our customers.

113. Then you did not know of your own knowledge that Park's Balsam was sold there at that time, did you?

A. I had the statement, of responsible parties to that effect.

114. Question repeated and an explicit answer requested.

A. I wasn't there to see it sold. I did not.

115. Did the defendants, Park and Son, at that time admit to you that they were sending their balsam to the Pacific coast or that they had sold it to go there?

A. They did not. They did not answer our letters asking for an explanation.

116. Did you ask them directly whether they had sold balsam to go to the Pacific coast at that time?

A. We did in our letter.

117. Please give the words you used in your letter.

A. "And we also demand of you a statement of what Wis-
272 tar's Balsam you have sold to parties east of the Alleghany or west of the Rocky Mountains within five years. We desire the names of the parties, the dates of sales, the quantities sold, and the prices or terms."

118. Then you did not ask them directly whether they had sold, Wistar's Balsam of Wild Cherry on the Pacific coast or not; but assuming that they had done so, you called upon them in language which they might consider offensive to render an account, and they did not answer?

A. We did not ask them whether they had or not. In our first letter we wrote them that we were informed that their article had made its appearance in the San Francisco market, and in polite and friendly terms asked them for an explanation. After waiting a reasonable time and receiving no reply to our letter, having in the meantime received additional and undisputed evidence of the fact that their article was being sold in that market, we wrote them what appears in our letter.

(Answer objected to by counsel for def'ts as irresponsive and improper.)

119. Do I understand you to say that the def'ts did not answer your letters that you refer to at all?

A. They did not.

120. Did they acknowledge the receipt of them?

273 A. They did not.

121. You do not know, then, that they ever did receive them, do you?

A. I do not.

122. You did not call on the defendants personally at that time to ask them whether they had sold Wistar's Balsam of Wild Cherry on the Pacific coast, did you?

A. I did not.

123. You don't know, of your own knowledge, that the letters you refer to were ever mailed to them, do you?

A. I know that they were mailed to them.

124. Did you put them in the post office yourself?

A. I cannot remember distinctly doing so in this case.

125. Did you mail the letters yourself?

A. I did.

126. But you don't remember putting them in the mail yourself, do you?

A. I do not.

127. Do your letters generally go to the mail by messenger, and did they then?

A. Our letters are usually mailed by either my brother or myself, and were at that time—particularly important letters.

128. Do you mean to say that you go to the office and deposit the letters yourself, instead of sending a clerk or boy?

A. We generally deposit them ourselves in the street letter boxes.

274 129. Then, without knowing whether your letters that you refer to were ever received by the defendant, and without positive knowledge that they were ever mailed, and without going to see them to ask whether or not they had sold Wistar's Balsam of Wild Cherry on the Pacific coast or to go to there, you wrote them the letter dated Boston, August 20, 1878, Exhibit H, and on Sept. 3, 1878, you reduced the price at which Wistar's Balsam of Wild Cherry was to be sold on the Pacific coast to $6 per dozen, without knowing from the defendants whether they had given you justifiable cause for so doing or not?

A. I did.

130. Do you know whether the Wistar's Balsam of Wild Cherry made by the defendants in this suit is the same article—exactly alike—with that made by you or not?

A. I don't know anything about how theirs is made.

131. Is the Wistar's Balsam of Wild Cherry made by you made at all times by the same formula—the same ingredients in the same proportions?

A. It is.

132. Then a mixture made of different ingredients or of the same ingredients in different proportions would not be Wistar's
275 Balsam of Wild Cherry, would it?

(Objected to by pl't'ffs' counsel because not opened on direct examination and for other reasons.)

A. It would not be.

133. Then you don't know whether d'f'ts ever made or sold any Wistar's Balsam of Wild Cherry or not, do you?

(Objected to by plaintiffs' counsel.)

A. I don't.

134. Hav-n't you heard that the so-called Wistar's Balsam of Wild Cherry made by defendants had a different taste and flavor from that made by you?

(Objected to by counsel pl't'ffs.)

A. I have.

135. Did you ever determine that by tasting of it yourself?

A. I have.

136. Do you know or do you understand that the flavor of the balsam made by defendants was more acceptable and popular than that made by pl't'ffs, and that on that account the demand for it was more active?

A. I do not.

137. You have spoken of a trade-mark. What do you refer to when you say trade-mark in this connection?

A. I mean the right to use the name "Wistar's Balsam of Wild Cherry."

138. Is that all that you mean by trade-mark in this connection?

276 A. No, sir; also the wrappers, labels, and advertisements bearing this name.

139. Is that all?

A. I believe it is.

140. Have you ever made application at the Patent Office to have your trade-mark for Wistar's Balsam of Wild Cherry registered?

A. I have not, and no application has been made, to my knowledge.

141. Have you or has any one for you made application for the registry of a label to be used in connection with it?

A. No.

142. In your Ans. to Int. 80 you say, "We have never sold a single bottle on that territory," meaning the territory in which the d'f'ts had exclusive right to sell the balsam. You do not know, do you, but that small or large quantities of balsam sold by you have been sold again on or to go on the territory of the defendants?

A. I have no knowledge of any such sales; certainly none has been so sold with my sanction. It may have been. I don't know but what it has.

Direct examination resumed:

143. What was the practice of your office with regard to letters and posting the same?

277 A. As far back as I can remember it has been customary for either my brother or myself to mail the letters ourselves either in the post office or in the street letter boxes.

144. Have you any doubts that the letters to Parks were mailed by yourself or sent to the mail in due course?

(Objected to by defendants' counsel as immaterial and irrelevant and calling for opinion of the witness.)

A. I have none whatever.

145. I forgot to ask you whether there was any label on the bottle, inside the wrapper, of which you have annexed a specimen to this deposition.

A. There is a label, but I have not put it in evidence.

146. Will you state whether it has always been the same, and will you annex a copy?

A. It has always been the same, so far as I know. I will annex a copy, to be marked Exhibit T.

147. Describe the bottle and state whether it has always been the same, so far as the marks on the glass are concerned.

A. The bottle is the same as that used by Isaac Butts, and has blown in the glass "Dr. Wistar's Balsam of Wild Cherry, Phila., I. B."

SETH A. FOWLE.

278 MASSACHUSETTS, BOSTON, *July* 29, 1885.

Subscribed and sworn to before me.

[SEAL.] CHAS. H. SWAN,
U. S. Commissioner.

279 A.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

PROBATE OFFICE.

I, Elijah George, register of the probate court in and for said county of Suffolk, hereby certify that at a probate court holden at Boston, in and for said county, on the fourth day of November, in the year of our Lord one thousand eight hundred and sixty-seven, Seth A. Fowle was duly appointed administrator of the estate of Seth W. Fowle, late of said Boston, deceased, intestate, and gave bond to the acceptance of the judge of said court for the due performance of said trust according to law.

I also certifiy that it appears by the records and files of said court that said appointment is now in full force.

In witness whereof I have hereunto set my hand and the seal of said court this seventh day of July, in the year of our Lord one thousand eight hundred and eighty-five.

[SEAL.] ELIJAH GEORGE, *Register.*

280 B.

This agreement, made at the city of New York on this twentieth day of May, A. D. one thousand eight hundred and forty-four, between Lewis Williams, of the city of Philadelphia, State of Pennsylvania, and Isaac Butts, of the city of New York, sheweth: That the said Lewis Williams, the senior and principal partner of the firm of Williams & Co., chemists, of Philadelphia, is the sole proprietor of a medicinal preparation called and known by the name of Wistar's Balsam of Wild Cherry; and this agreement witnesseth that the said Lewis Williams, for and in consideration of the promises and covenants hereinafter mentioned on the part of said Isaac Butts, he, the said Lewis Williams, has sold, transferred, and delivered to the said Isaac Butts a true copy of the recipe used in preparing said Balsam of Wild Cherry, together with the sole right to

manufacture and sell said medicine forever in the six New England States; also in the States of New York, New Jersey, Delaware, Maryland, North and South Carolina, Georgia, District of Columbia, and the various provinces comprising British America; also in the counties of Franklin, Cumberland, Perry, Juniata, Mifflin,
281 Union, Northumberland, Columbia, Lycoming, Tioga, and all counties that lie east of those named in the State of Pennsylvania, together with the counties of Hardy, Pendleton, Bath, Alleghany, Botetourt, Roanoke, Montgomery, Pulaski, Wythe, Smyth, and Washington, and all counties that lie east of these in the State of Virginia.

And the said Isaac Butts, for and in consideration of the right to manufacture and sell said medicine in the States and territory herein specified, does hereby covenant, promise, and agree to and with the said Lewis Williams that he, the said Isaac Butts, will well and truly pay to the said Lewis Williams the sum of four thousand dollars, lawful money of the United States, in such sums and within such times as shall be hereafter specified; and the said Isaac Butts also promises and agrees to — the said Lewis Williams, without abatement, deduction, or defalcation, all such sums of money as may be due at the time this agreement is signed for supplies of said medicine that have been sold or consigned to him for sale by the said Lewis Williams, his associates or agents, to wit, the sum of eight thousand six hundred and sixty-one dollars, together
282 with the sum of four thousand dollars, before mentioned, to be paid as follows, viz: Two thousand dollars to be paid within twenty days after this agreement is signed; two thousand within sixty-five days after the first payment is made; two thousand within thirty-five days thereafter; two thousand more on the tenth day of January next, the balance, amounting to the sum of four thousand six hundred and sixty-one dollars, to be paid in full by the first day of August, one thousand eight hundred and forty-five.

And the said Isaac Butts further covenants, promises, and agrees that he will not sell, cause to be sold, or establish agencies for the sale of said Balsam of Wild Cherry in any part of the United States except in the States and Territories herein granted to him, and also that he will not sell or cause any of said medicine to be sold at a less price than seven dollars and twenty cents nett for each and every dozen sold by him, except to such persons as shall become his agents for a whole State or Territory; and in all cases where such agencies are granted by Isaac Butts, his heirs or successors, he also
283 promises and agrees that he or they shall take from such agents an agreement, with a sufficient guarantee or penalty, that no sale of said medicine shall be made at a less price than that above stated or in such manner as shall tend to reduce the price below that specified.

For and in consideration of the faithful performance of the covenants and promises herein made by the said Isaac Butts, the said Lewis Williams covenants, promises, and agrees that from and after the signing of this agreement he, the said Lewis Williams, will not manufacture or sell any of said medicine of his own or agents' man-

ufacturing within the territory herein granted to said Isaac Butts, nor any other medicine bearing the name of wild cherry purporting to be an improvement on the said medicine or under a different name prepared from the same recipe. The said Lewis Williams further promises that he will not manufacture any medicine bearing his name or the name of Williams & Co., as manufacturers, that shall be designed particularly for the cure of the same diseases as the Balsam of Wild Cherry, except such medicines as are commonly prepared by druggists, and will also defend him against all other
284 claimants to the right to manufacture said medicine: Provided always, That he shall not make known to any other person the ingredients employed in preparing the same.

The said Isaac Butts also agrees that in case there shall be any breach of this agreement by a failure on his part, or on the part of his heirs or successors, to pay to the said Lewis Williams or his heirs all such sums of money as are herein specified within the time allowed in this agreement the right of said Isaac Butts to manufacture and sell said medicine shall then cease and determine; all of said medicines in the hands of his agents shall *not* be transferred to the said Lewis Williams at the prime cost, the same to be paid for out of the proceeds of the sales thereof, and the right of said Lewis Williams to manufacture and sell said medicine in all the States and territory granted to the said Isaac Butts shall be the same as if this agreement had never been executed.

In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year aforesaid.

LEWIS WILLIAMS. [SEAL.]
ISAAC BUTTS. [SEAL.]

Sealed and delivered in presence of—
CHAS. W. SANFORD.
M. A. F. HARRISON.

285 CITY AND COUNTY OF NEW YORK, *ss:*

On the twenty-third day of May, 1844, before me personally appeared Lewis Williams and Isaac Butts, known to me to be the same persons described in and who executed the foregoing agreement, and duly acknowledged that they executed the same as their act and deed.

CHAS. W. SANFORD,
Commissioner of Deeds, New York.

NEW YORK, *May 24th*, 1844.

Rec'd of Isaac Butts sixteen hundred and fifty dollars and his note for three hundred and fifty dollars in full for the first instalment of the within agreement.

$2,000. LEWIS WILLIAMS.

[Endorsed:] Copy. Agreement. Lewis Williams and Isaac Butts.

286 C.

This agreement, made this first day of March, in the year one thousand eight hundred and forty-five, between Isaac Butts, of the city, county, and State of New York, party of the first part, and Seth W. Fowle, of the city of Boston, State of Massachusetts, druggist, party of the second part:

Whereas the said party of the first part did, on or about the twentieth day of May, in the year one thousand eight hundred and forty-four, purchase from one Lewis Williams a certain medicinal preparation called and known by the name of Wistar's Balsam of Wild Cherry, with the sole and exclusive right to manufacture and sell the said medicine in the six New England States, to wit, in the States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, and Rhode Island, and also in the States of New York, New Jersey, Delaware, Maryland, North Carolina, South Carolina, and Georgia, and in the District of Columbia, and also in the various provinces comprising British North America, and also in that part of the State of Pennsylvania comprising the counties of Franklin,
287 Cumberland, Perry, Juniata, Mifflin, Union, Northumberland, Columbia, Lycoming, Tioga, and all the other counties in the State of Pennsylvania that lie east of the said counties named, and also in that part of the State of Virginia comprising the counties of Hardy, Pendleton, Bath, Alleghany, Botetourt, Roanoke, Montgomery, Pulaski, Wythe, Smyth, and Washington, and all the counties in the State of Virginia which lie east of the said counties last named, in which said purchase and as a part thereof was transferred to the said party hereto of the first part a true copy of the receipt for the preparation of the said balsam.

And whereas also the said party of the first part has agreed to sell the said balsam and the right to manufacture and sell the same in as full and ample a manner as the same was so as aforesaid purchased and is now held and owned by him, and the said party of the second part has agreed to purchase the same, said sale and purchase to be made upon the terms and conditions hereinafter more particularly specified and set forth:

Now, therefore, this agreement witnesseth that the said party of the
288 first part, for and in consideration of the sum of twenty-nine thousand and five hundred dollars, lawful money of the United States, hath bargained and sold and by these presents doth grant, bargain, and sell unto the said party of the second part, in as full and ample a manner as was purchased and is now held and owned by him as aforesaid, the said Wistar's Balsam of Wild Cherry and a true copy of the receipt for the manufacture thereof, together with the sole and exclusive right to manufacture and sell the said medicine in the said States, provinces, and counties hereinbefore in the recitals hereof particularly set forth, together with all the medicines of whatever description now in the hands of local agents of the said party of the first part belonging to him, and all sum and sums of money due to the said party of the first part on account of sales of such medicines, and the account books of the said party of the

first part containing said accounts so far as they have relation thereto, and all the evidences of such indebtedness, excepting from such sums so due as aforesaid all sum and sums of money due previous to the first day of January last from Messrs. A. B. and D. Sands, Comstock & Co., Comstock & Tyler, and S. Ingersoll & Co., in the city
289 of New York, and from E. B. Vaughan, G. D. Witherell & Co., Frederic Klett & Co., Edward Cole, T. W. Dyott & Sons, Robinson, Collins & Co., W. W. & H. Smith, of the city of Philadelphia, and also all the stock of drugs and medicines now on the premises at No. 32 Ann street, in the city of New York (excepting from out the said drugs and medicines last mentioned Peter's Pills and articles held upon commission), and also all the apparatus and appurtenances of the said party of the first part used in the laboratory of the said party of the first part in the manufacture of the said balsam, and all stereotype plates, pamphlets, and also sundry bottle moulds; to have and to hold the same unto the said party of the second part, his executors, administrators, and assigns, to his and their own proper use, benefit, and behoof forever.

The said twenty-nine thousand and five hundred dollars to be paid by the said party of the second part in manner following, to wit, nine thousand and five hundred dollars of the same to be paid at such time and in such manner as has been or shall be agreed by the parties, the balance of twenty thousand dollars to be
290 paid and secured as follows, to wit, four notes to be given by the said party of the second part, made by him and endorsed by his brother, James Fowle, dated on the date hereof, said notes to be for two thousand dollars each, with interest from their date, and due, respectively, on the twelfth day of January, on the fifteenth day of March, on the first day of June, and on the first day of September, which will be in the year one thousand eight hundred and forty six; six other notes to be given by the said party of the second part, made by himself, dated on the day of the date hereof, for two thousand dollars each, with interest from their date, respectively, and due, respectively, on the first day of November, in the year one thousand eight hundred and forty-six, and the first day of January, March, May, July, and September, one thousand eight hundred and forty-seven; and, as a security for the payment of the said last-mentioned notes in manner aforesaid, the said party of the second part, at the time of the execution of this instrument, transfers to the said party of the first part certain shares of the stocks of the State of Pennsylvania to an amount which, at
291 par, would realize twelve thousand dollars, to be held by the said party of the first part until the said last-mentioned notes and the whole of them are paid off and discharged; but if the said note or either of them are not paid at maturity, the said party of the first part to be at liberty at his election to sell of the said stock so much thereof as may be necessary to pay the amount then due, and out of the proceeds thereof to pay himself the amount of the said note or notes then due and unpaid. It is understood and agreed that the said stock, if unsold as last aforesaid or so much thereof as shall be unsold upon the payment of the said last-men-

tioned six notes, shall be transferred by the said party of the first part to the said party of the second part, and upon the payment of any of the said six notes the said stock to be retransferred, a part thereof in proportion to the amount of such payment.

The interest on the said ten notes to be at the rate of six per centum per annum, and to be paid yearly on the first day of March in each and every year; but when any of the said notes shall become due and be paid the interest on said note so due shall
292 be paid at and up to the time of such payment, said notes above mentioned to be payable at the Suffolk Bank, in the city of Boston, in the State of Massachusetts.

It is understood by the parties hereto that the said party of the second part shall have the privilege at his election of paying off the said notes and the several sums or any part thereof due upon the sale and purchase herein mentioned whenever he shall see fit, upon a notice through the mail of thirty days to the party of the first part.

And I, the said party of the first part, for myself, my heirs, executors, and administrators, do covenant and agree to and with the said party of the second part, his personal representatives and assigns, that I, the said party of the first part, will not hereafter manufacture or sell any of said Balsam of Wild Cherry, whether manufactured by myself or by my servants or agents, within the States, districts, provinces, and counties above mentioned, any or either of them, nor any other medicine whatever bearing the name of wild cherry, whether or not purporting to be an improvement on
293 the said balsam, nor the said balsam under a different name prepared from the same receipt; and I do, in like manner, further covenant and agree that I will deliver over to the said party of the second part all the property so as aforesaid sold to him, and that I will not in any way or manner collect or interfere with the debts so as aforesaid assigned to the said part of the second part.

And I, the said party of the second part, for myself, my heirs, executors, and administrators, do covenant and agree to and with the said party of the first part, his personal representatives and assigns, that I, the said party of the second part, will make punctual payment of the said notes, respectively, with the interest, at the times and in the manner above-mentioned.

And I, the said party of the second part, for myself, my heirs, executors, and administrators, do further covenant and agree to and with the said party of the first part, his personal representatives and assigns, that I, the said party of the second part, will not sell, cause to be sold, nor establish agencies for the sale of said Balsam of Wild Cherry in any part of the United States, except within the
294 States, districts, and counties herein mentioned, and that I will not sell nor cause the same to be sold at a price less than seven dollars and twenty cents nett for each and every dozen sold or caused to be sold by me, except to such persons as shall become my agents for a whole State or Territory.

And in all cases where such agencies are granted by me, my personal representatives or assigns, I covenant and agree in manner

aforesaid that I, my personal representatives and assigns, will take from such agent or agents an agreement, with a sufficient guaranty or penalty, that no sales of said medicine shall be made at a less price than that above stated, or in such manner as shall tend to reduce the price below that specified.

And I, the said party of the second part, do further covenant and agree in manner aforesaid that I will pay all the current expenses of advertising, postage, freight, and all the other current expenses now contracted for or authorized by the said party of the first part in and about the sale and disposition of the said medicines, and will save the said party of the first part harmless by reason of the said current expenses and every part thereof.

295 In witness whereof the parties hereto have hereunto interchangeably set their hands and seals the day and year first above written.

ISAAC BUTTS.
SETH W. FOWLE.

Sealed and delivered in presence of—on the 7th page "or territory," interlined between "State" & "and," near the middle of the page—

AUGS. F. SMITH.

CITY AND COUNTY OF NEW YORK, *ss:*

On this fourth day of April, 1845, before me came Isaac Butts and Seth W. Fowle, to me known to be the individuals described in and who executed the above instrument, and duly acknowledged that they executed the same.

CH. ED. SHEA,
Com. of Deeds.

296 Received, New York, March first, 1845, of Seth W. Fowle, seven certificates of the stocks of the State of Pensylvania as follows: One certificate for two thousand five hundred dollars, six per cent. stock of 6th May, 1841, bearing interest from the first day of August, 1842; one other certificate for two thousand five hundred dollars, bearing interest at six per cent. from the first day of February, 1843; one other certificate for three thousand dollars, bearing interest at six per cent. from the first day of February, 1843; one other certificate for two thousand dollars, bearing interest at five per cent. from the first day of August, 1843; one other certificate for one thousand dollars, bearing interest at six per cent. from the first day of February, 1843; one other certificate for six hundred dollars, bearing interest at six per cent. from the first day of Aug., 1, 1843; one other certificate for four hundred dollars, bearing interest at six per cent. from the first day of August, 1843, making in all twelve thousand dollars, the stock mentioned in the within agreement.

It is understood and agreed that the said party of the second part may receive and collect the interest on the said stock so long
297 as he fulfils the covenants and agreements herein contained, but if at any time he shall fail in any of said covenants and

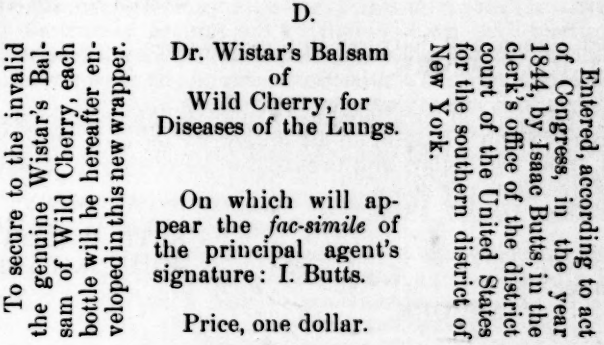
agreements, from that time the said party of the first part to collect the interest and apply the same on the said notes.

ISAAC BUTTS.

Witness:
AUGS. F. SMITH.

[Endorsed:] Copy. Agreement. Isaac Butts & Seth W. Fowle.

298 D.


To secure to the invalid the genuine Wistar's Balsam of Wild Cherry, each bottle will be hereafter enveloped in this new wrapper.
Dr. Wistar's Balsam of Wild Cherry, for Diseases of the Lungs.
On which will appear the *fac-simile* of the principal agent's signature: I. Butts.
Price, one dollar.
Entered, according to act of Congress, in the year 1844, by Isaac Butts, in the clerk's office of the district court of the United States for the southern district of New York.

A valuable family medicine for consumption of the lungs, coughs, colds, asthma, bronchitis, croup, whooping-cough, difficulty of breathing, pains in the side or breast, liver complaint, etc.

Originally prepared by Williams & Co.

Sold, wholesale and retail, by Seth W. Fowle & Sons, 115 High St., Boston, Mass., proprietors and general agents.

Sold also by druggists and appointed agents throughout the United States.

299 E.

Agreement between Seth W. Fowle, of Boston, and John D. Park, of Cincinnati, for the manufacture and sale of Wistar's Balsam of Wild Cherry for California, Oregon, and the Pacific coast on joint account.

The said Seth W. Fowle shall have the general management of the business, shall keep an accurate account of the same, and shall render a statement of account to the said John D. Park every six months.

The said Fowle agrees to prepare the balsam ready for the market and deliver it on board ship in Boston for two dollars and twenty-five cents per dozen.

Any Wistar's Balsam made either by said Fowle or by said Park that has been shipped to the Pacific coast since the first of April, 1863, or that may hereafter be sent there by any party, shall be put into this account at two dollars and twenty-five cents per dozen.

The price of the balsam delivered on the Pacific coast shall be

seven dollars per dozen, in coin, six months from date of shipment in Boston.

At least one thousand dollars shall be expended in advertising during the next six months.

300 Witness our hands and seals this sixteenth day of December, A. D. 1863.

SETH W. FOWLE.
JOHN D. PARK.

Sealed, signed, and delivered in presence of—
J. P. DINSMORE.

This contract is so far altered as to increase the price for the manufacture of Wistar's Balsam on all shipments on and after October 1, 1864, from two dollars and twenty-five cents to two dollars and seventy-five cents per dozen.

New York, Dec. 17, 1864.

SETH W. FOWLE.
JOHN D. PARK.

Witness:
J. P. DINSMORE.

[Endorsed:] Copy. Agreement. Seth W. Fowle and John D. Park.

301 F.

Know all men by these presents that I, John D. Park, of Cincinnati, in the State of Ohio, in consideration of five thousand dollars, to me paid by Seth A. Fowle (the son and surviving partner of the late Seth W. Fowle) and Lucy Ann S. Fowle (the widow of said Seth W.), both of Boston, in the State of Massachusetts, copartners under thrm of Seth W. Fowle & Son, the receipt whereof is hereby acknowledged, hereby sell, assign, transfer, and convey to said Seth A. Fowle and Lucy Ann S. Fowle, copartners as aforesaid, all my right, title, interest, and claim in and to the property or proprietary right or franchise of the medicine or medicinal preparation called and known as "Wistar's Balsam of Wild Cherry," for and so far as regards all the territory or part of North America lying westerly of the ridge of the Rocky Mountains, embracing the whole of the following States and Territories of the United States, viz., the States of California, Oregon, and Nevada and the Territories of Washington, Idaho, Utah, Arizona, and Alaska, and so much and such parts of the Territories of Montana, Wyoming, Colorado, and New Mexico as are westerly of
302 the ridge of said Rocky Mountains, meaning and intending all territory lying westerly of said Rocky Mountains (including the westerly slope thereof) and between said mountains and the Pacific Ocean, and also all my right, claim, and interest in and to the good will of the business of making, putting up, and selling said Wistar's Balsam of Wild Cherry within said limits, and in and to the trade-marks, so far as used within said limits on the labels, bottles, wrappers, or packages containing said medicine or otherwise

used in carrying on said business within the limits or territory aforesaid; and for the consideration aforesaid I also sell and convey to said Fowle the good will of all my business and trade in said Wistar's Balsam of Wild Cherry in all of British Columbia and the Republic of Mexico as embraced in their present domain, and hereby relinquish to said Fowles and their legal representatives the whole market for the sale of said medicine therein so far as I am concerned, intending hereby to transfer and relinquish to said Fowles the whole market for the said medicine of all said territory westerly of the Rocky Mountains, and also (so far as I have the
303 power so to do) of all said British Columbia and Mexico, so that they and their legal representatives and assigns may have and enjoy the sole and exclusive right of selling said medicines within said limits so far *far* as I can assure such right to them, and free from any competition or interference by me or any one claiming under me or acting by or with my authority, permission, or aid, either directly or indirectly.

And I, the said Park, for myself, my heirs, executors, administrators, and assigns, hereby covenant and agree with said Seth A. Fowle and Lucy Ann S. Fowle, copartners as aforesaid, their legal representatives and assigns, that I will not and my heirs, executors, administrators, and assigns shall not, either within said territory westerly of the ridge of the Rocky Mountains or within said British Columbia or Mexico, hereafter make, put up, sell, or offer or expose for sale any of said Wistar's Balsam of Wild Cherry or any other medicine whatever bearing the name of "wild cherry" in whole or in part, nor the said medicine under a different name prepared substantially from the same recipe or formula, or use the same
304 or trade-marks or any of them, or be concerned, directly or indirectly, in the business of selling or in promoting the sale of said medicine within said limits in competition with said Fowles, their representatives and assigns, or in any way or by any means whatsoever do or knowingly aid or abet any other person to do anything to prejudice or interfere with the business of selling said medicine within the limits aforesaid solely by said Fowles, their representatives and assigns.

And I, said Park, for myself, my executors, and administrators, further covenant with said Seth A. Fowle and Lucy Ann S. Fowle, copartners as aforesaid, and their respective executors and administrators, that I will and my heirs, administrators, executors, and assigns shall, upon reasonable request at any time or times hereafter and at the expense of the covenantees, do all such further acts and execute and deliver all such instruments of further assurance as may be necessary or expedient, in the opinion of competent counsel, the more fully to assure and confirm the premises to said cove-
305 nantees, and to enable them to realize and enjoy the full benefit and advantage intended to be assured to them by this instrument.

In witness whereof I, said John D. Park, have hereto set my hand

and seal this seventeenth day of November, A. D. eighteen hundred and sixty-nine.

(Signed) JOHN D. PARK.

Executed and delivered in presence of—
ANDREW J. TULLY.
JAS. S. AUSTIN.

[Endorsed:] Copy. Conveyance. John D. Park to Seth A. and Lucy A. S. Fowle.

306 G.

BOSTON, *July* 31, 1878.

Mess. John D. Park & Sons, Cincinnati, Ohio.

GENTLEMEN: We are informed that Wistar's Balsam of your make has made its appearance in the San Francisco market. Can you account for this? Have you sold your article to any party at such a price that they can send it to San Francisco to be sold at less than your regular price with freight added?

Please inform us how much balsam you have sold John F. Henry, Curran & Co., or any other parties in New York, since Jan. 1st last, and at what price.

We trust you are meeting your payments on your compromise without difficulty, and that you will settle up the old matters satisfactorily.

Your- truly, SETH W. FOWLE & SONS.

[Endorsed:] Copy. Letter to John D. Park & Sons, July 31, 1878.

307 H.

BOSTON, *August* 20, 1878.

Messrs. John D. Park & Sons, Cincinnati, Ohio.

GENTLEMEN: We wrote you July 31st in regard to the sale of your Wistar's Balsam on the Pacific coast, but have received no reply to our letter. We have now indisputable evidence that your article is being sold in that market with your knowledge or sanction, and we demand an explanation. We also demand of you a statement of what Wistar's Balsam you sold to parties east of the Alleghany or west of the Rocky M't's within five years. We desire the names of the parties, the dates of sales, the quantities sold, and the prices or terms. We further prohibit the sale by you, directly or indirectly, of any Wistar's Balsam to parties in the territory where we have the right to sell the balsam. We have spent more than a quarter of a million dollars during the last ten years in advertising Wistar's Balsam and must have benefited the sale of your article many thousand dollars, but we have never, directly or indirectly, sold a bottle of the balsam on your ground. We expect similar effort on
308 your part to prevent the sale of your balsam on our ground.

About nine years since we purchased of you all your rights and interests in the Pacific-coast market, paying you a large price for the same.

We have since spent a large sum of money in advertising the balsam there, and we are surprised that you should in any way endeavor to promote the sale of your balsam in that territory.

We particularly prohibit your selling Wistar's Balsam, directly or indirectly, to John F. Henry, Curran & Co., or to any parties in New York, Philadelphia, Baltimore, Buffalo, San Francisco, or other places on our territory or to parties on your territory at less than $84 per gross, unless you take an obligation from them that they will not sell at less than that price, as provided for in your agreement with Williams and Co.

Yours truly, SETH W. FOWLE AND SONS.

[Endorsed:] Copy. Letter to John D. Park & Sons. Aug. 20, 1878.

309 I.

To all persons to whom these presents shall come:

We, Lucy Ann S. Fowle, Helen A. Fowle, Elizzie E. Fowle, Horace S. Fowle, Alice W. Fowle, and said Lucy Ann S., as the guardian of Annie D. Fowle, a minor, being the widow and all the children of Seth W. Fowle, late of Boston, deceased, except his oldest son, Seth A. Fowle, his surviving partner and the administrator of his estate:

Whereas the late firm of "Seth W. Fowle and Sons," which consisted of said Seth W. Fowle, having three-quarters interest, and said Seth A. Fowle, having one-quarter interest, was dissolved by the death of said Seth W. Fowle, October 19th, 1867, and the value of the interest of said deceased in the copartnership property was fixed by appraisers and agreed by the parties in interest to be the sum of ten thousand two hundred and forty-one $\frac{8}{100}$ dollars, in addition to certain merchandise, consisting principally of sundry lots of oxygenated bitters, appraised and agreed to be of the value of two thousand dollars, which, though kept for sale at the place of business of the firm, were the individual property of the deceased;

310 and, it having been determined at a family council, soon after the decease of said Seth W., that the interests of all the family required that the business of preparing and selling proprietary medicines as carried on by the late firm should be continued without any interruption, and in such way, if possible, that the widow and all the children might derive an income therefrom, it was agreed by the said surviving partner and the widow and the adult children of the deceased (their said mother being afterwards appointed the guardian of the minor children) that the said Seth A. should take at the said appraised values the said interest of the deceased partner in the partnership property of the late firm and also said oxygenated bitters and charge himself therewith in his administration account, and also with the amount due from him for the original purpose of his quarter part of the partnership property and business from deceased, and, being thus the owner of the whole concern, should sell to said Lucy Ann S. one quarter interest in the entire property and business of the concern at the same appraised rates, and that they should continue the business as copart-

311 ners from the decease of said Seth W. under the old firm name, the said Seth A. having three-quarters interest in the capital and said Lucy Ann S. one-quarter interest; that said new concern should assume all the debts and liabilities of the late firm and pay to each of the other five children of the deceased, for the use of their respective shares of that part of the property of the deceased thus kept in the business, one-twentieth part of the profits, and that the remaining fifteen-twentieths of the profits should be divided between said said Lucy Ann S. and Seth A. in the following proportions, viz., four-twentieths to said Lucy Ann S. and eleven-twentieths to said Seth A., the managing partner; and said business was thus carried on and the profits divided according to said arrangement and agreement up to the twenty-ninth day of June, 1872, the admission of Horace S. Fowle as a partner January 2, 1871, and the change in the firm name at that time to "Seth W. Fowle & Sons" being a nominal charge only, the said Horace S. making no contribution to the capital, but having a salary in addition to one-
312 twentieth of the profits, to be paid him as before, and said shares of the profits so paid to each of said five children for the use of their respective shares of their father's property kept in the business having greatly exceeded the legal rates of interest on the value thereof;

And whereas, on said 29th day of June, 1872, the said partnership was dissolved, the said Lucy Ann S. relinquishing and selling out to said Seth A. her quarter interest and share of all the copartnership property and assets, except only one-quarter part of the property or proprietary right of the recipe and trade-mark of "Wistar's Balsam of Wild Cherry," which she retained, he assuming all the debts and liabilities of the concern, and the said Seth A. and Horace S. being about to form a new partnership and to continue on their own sole account the business of preparing and vending proprietary medicines from the first day of July, 1872, an adjustment and settlement was made between said Lucy Ann S. and Seth A. and Horace S. Fowle of all matters relating to the business since the decease of said Seth W. Fowle, and between them and said Horace S.
313 since his admission as a partner as aforesaid, and of the interest of each of the partners in the copartnership property and the assets of every kind, and the amounts thereof were fixed and agreed upon and an adjustment and settlement was also made between the widow and other heirs of said Seth W. Fowle and said Seth A. of all matters respecting or in any way concerning the personal property of said Seth W. (including his interest in copartnership property of said firm, which was dissolved by his decease as aforesaid), and of the share of the profits of the business since, which had accrued to each of said five younger children as above recited, and also of the sale of certain lots of land in Medford, the proceeds whereof, so far as paid in cash, had been received by said Seth A. Fowle as the agent of the widow and heirs and distributed to them according to their respective interests (the mortgage and note of the deceased, to which said lots were subject, being paid by the administrator and charged in his account), and also concerning all other

matters and things in relation to our interests and affairs and property by said Seth A. done and transacted since the decease of said Seth W. up to said June 29th, 1872, the distributive shares
314 of the widow and heirs of the balance of the personal estate of said deceased found due to each, so far as the estate can be settled, until the termination of two suits still pending and the disposal of certain interests in land and stock of the "North Shore Land Co.," being found and agreed to be as follows, viz., that of the widow, $3,988\frac{43}{100}$, and that of each of the five younger children, $1,329\frac{48}{100}$;

And whereas the several balances found due upon said family accounting and adjustment of all matters up to said date have been now paid to each of us, except said Horace, by satisfactory note (subject to refunding, should it be necessary to meet any outstanding debts of the deceased or expenses of administration), said notes to said Helen, Elizzie, Alice, and Annie also embracing other amounts accrued to them from other sources since the date of said adjustment, and said Horace having turned in his balance towards his purchase of his share of his present firm:

Now know ye that, in consideration of the premises and of one dollar to each of us paid by said Seth A. Fowle, the receipt whereof is hereby acknowledged, we release and relinquish to said
315 Seth A. Fowle all — respective rights and interests in any and all the property and assets of said late firm of Seth W. Fowle and Son, which was dissolved by the decease of the senior partner thereof October 19th, 1867, as aforesaid, and also in said Oxygenated Bitters, and in all the property and assets of said other firm, by whom the business was continued as above recited; and we also severally release, discharge, and acquit the said Seth A. from all claims and demands by reason of or in any way relating to the matters above recited and from any further accountability or liability to us, respectively, either as such surviving partner, administrator, partner, individually, or otherwise, except on said notes given us in settlement as aforesaid, and for any assets of the estate of said Seth W. Fowle which he may receive as such administrator after said 29th June, 1872, there still remaining then and now uncollected a claim in favor of the estate in suit against one Ward, and a suit against the estate by one Valentine, and said interest in North Shore Land Company stock and lots, all other matters being adjusted and settled, save only that as to one-quarter part of the property
316 and trade-make of "Wistar's Balsam of Wild Cherry," which said Lucy Ann S. Fowle reserved and retained in the said adjustment and for which she accounted in the settlement of her balance; she still owns the same, having leased it to the new firm, composed of said Seth A. and Horace S.; and as to the balance due to said Horace S., which on said general accounting and adjustment was found and agreed to be the sum of $1,911.31, he turned the same in on the formation of his present partnership with Seth A., July 1, 1872, towards payment for his share of the capital of said new concern.

In witness whereof we have hereto set our hands and seals this

first day of January, A. D. eighteen hundred and seventy-three, those of us who were minors at our father's deceased and have since become of age hereby appoving of, ratifying, and confirming the said arrangement and agreement respecting such of his property as was employed in the said business at his decease and everything done in pursuance thereof.

LUCY ANN S. FOWLE. [SEAL.]
HELEN A. FOWLE. [SEAL.]
ELIZZIE E. FOWLE. [SEAL.]
HORACE S. FOWLE. [SEAL.]
ALICE W. FOWLE. [SEAL.]
LUCY ANN S. FOWLE, *Guardian.* [SEAL.]

Executed and delivered in presence of—
EMMIE M. FOWLE.
W. F. WHITCOMB.
E. W. OTIS to H. S. F.

[Endorsed:] Copy. 5. Relinquishment of all claims to the business by Lucy A. S. Fowle *et als.*

317 K

An indenture, made and concluded this first day of July, A. D. eighteen hundred and seventy-two, between Lucy Ann S. Fowle, of Boston, in the county of Suffolk and Commonwealth of Massachusetts, widow, of the first part, and Seth A. Fowle and Horace S. Fowle, both of said Boston, copartners under the firm of "Seth W. Fowle and Sons," of the second part.

Whereas the said party of the first part is now the owner of one undivided quarter part of the property or proprietory right or franchise, recipe, and trade-mark of the medicine or medicinal preparation called and known as "Wistar's Balsam of Wild Cherry," and the said party of the second part now own the other three-quarter parts theoref, and said Seth and Horace have, on the day of the date hereof, formed a partnership in the business of preparing and vending proprietary medicines and all things to said business appertaining for the term of five years (unless sooner terminated by the death of either partners or mutual consent), and as much longer as they may agree to extend the same:

Now, this indenture witnesseth: That the said party of the
318 first part doth hereby lease, let, and demise to said party of the second part her said undivided quarter part of the said property or proprietary right, recipe, and trade-mark of said "Wistar's Balsam of Wild Cherry," and assign and transfer to said party of the second part the beneficial use and enjoyment of all her right, title, and interest in the said medicine, recipe, and trade-mark:

To hold during the continuance of their said partnership in said business, whether under their said present partnership agreement or any modification, renewal, or extension thereof or otherwise.

And said party of the first part hereby covenants with said party of the second part that she will not, nor shall her executors or ad-

ministrators, do or permit to be done anything to prejudice or interfere with the beneficial use and enjoyment by said party of the second part of the entire and exclusive property or proprietary right or franchise of said medicine, recipe, and trade-mark so long as they, said Seth and Horace, shall continue to carry on said business and shall punctually pay to her or her representatives the annual
319 rent or compensation of four hundred dollars per annum, according to their covenant in that behalf hereinafter contained.

And the said party of the second part hereby covenant with said party of the first part that so long as they, said Seth and Horace, shall continue to carry on said business they will pay to her or her legal representatives, for the rent or compensation for the demised premises and the exclusive use and enjoyment of her said undivided right and interest in said medicine, recipe, and trade-mark, the sum of four hundred dollars per annum, in quarter-yearly payments of one hundred dollars each, on the first days of October, January, April, and July in each year, and after that rate for any part of a year.

It is understood and agreed that, in case there should be during the continuance of this lease any interference with or violation of or infringement upon the exclusive proprietary right and property or franchise of said medicine, recipe, or trade-mark (now belonging to the parties to this indenture in the proportions above recited) by any other or outside parties, the said Lucy Ann S. gives to said Seth and Horace full power and authority to use her name in any
320 suit or proceeding which may be or become necessary or expedient to preserve, protect, or vindicate said rights and property, and will pay her *pro rata* share of the reasonable expense thereof.

In witness whereof said parties have hereto set their hands and seals as of and on the day and year first above written.

LUCY ANN S. FOWLE. [SEAL.]
SETH A. FOWLE. [SEAL.]
HORACE S. FOWLE. [SEAL.]

Executed and delivered in presence of—
EMMIE M. FOWLE.
W. F. WHITCOMB.
E. W. OTIS to H. S. F.

[Endorsed:] Copy. 6. Lease. Lucy Ann S. Fowle's interest in Wistar's Balsam of Wild Cherry to Seth A. & Horace S. Fowle.

321 L.

John D. Park, A. R. Park, G. F. Park.

John D. Park & Sons, proprietary medicines and druggists' sundries, 175, 177, & 179 Sycamore St.

CINCINNATI, *March 8th*, 1877.

S. W. Fowle & Son.

GENTLEMEN: Please send us copy of your advertising sheets for

Wistar's Balsam; also 1 empty bottle, labeled and wrapped, for small Wistar's Balsam.

We are discussing the matter as to advertising in the papers.

Respectfully yours, JOHN D. PARK & SONS.

Seth W. Fowles & Sons, March 12, 1877, Boston.

(Written in pencil:) Sent notices and 1 doz. packages sm. bals. (bottles empty).

Copy of this letter sent McGuffey & Morrill June 7, '84.

322 M.

MARCH 12, 1877.

John D. Park & Sons, Cincinnati, Ohio.

GENTLEMEN: Your favor of the 8th has just been received. We send by the Adams Ex. Co. 1 doz. small balsam bottles (labeled and wrapped), showing the manner in which we do up the packages. We also enclose samples of advertising matter we are using. You will see that most of the matter is made up in connection with that for Peruvian syrup. You are at liberty to use any of the Wistar's Balsam matter (except the certificates of Rev. Francis Lobdell and W. P. Ogilsby, which we have been requested to make no further use of). Of course you will not use any of the Peruvian Syrup matter, as we are likely to use this in the West ourselves.

We think Mess. Rowell & Co. can do your advertising better and cheaper than any other party or than you can do it yourselves, if you try them on the open-contract plan as explained to your Mr. A. R. Park.

323 Will you be kind enough to inform us how much of your Wistar's Balsam John F. Henry, Curran & Co. have bought each year for the last five years?

At what price do you sell them, and do you allow freight to New York?

Yours truly, SETH W. FOWLE & SONS.

[Endorsed:] Copy. Letter of March 12, '77. Seth W. Fowle & Sons.

324 N.

BOSTON, *June* 1, 1877.

Mess. John D. Park & Sons, Cincinnati, Ohio.

GENTLEMEN: Your favor of the 30th ult. has been received. Please to inform us how much balsam you have sold since the writer visited you on the 23rd of Feb'y last. If you cannot do this, please state how many bottles you have received since that date, and how many bottles and how much balsam are now on hand. Has any balsam been put upon the market at less than your regular price? If so, how much and at what prices?

We presume you received the small balsam bottles and advertis-

ing matter we sent you some time since. Have you done anything about advertising or putting up a 50-cent. size?

Your ideas were so much above ours in regard to the value of the balsam that we gave up all hopes of buying you out, but we will again see what we can do and communicate with you soon.

Yours truly, SETH W. FOWLE & SONS.

[Endorsed:] Copy. Letter of June 1, 1877. Seth W. Fowle & Sons.

325 O.

Statement of Sales of Wistar's Balsam of Wild Cherry by Seth W. Fowle & Sons from 1875 *to* 1884, *both years inclusive.*

1875.	463½ gross, amounting to	$41,822 21	Actual. Quantities actual, amounts estimated, but substantially correct.
1876.	397½ " " "	35,653 19	
1877.	450 " " "	40,446 00	
1878.	352 " " "	31,680 00	
1879.	263½ " " "	23,670 00	
1880.	278 " " "	25,020 00	
1881.	315 " " "	28,350 00	
1882.	380 " " "	33,440 00	
1883.	356½ " " "	30,659 00	
1884.	279 " " "	23,994 00	
10 y'rs,	353½ gross	$314,734 00	

326 P.

Dr. Wistar's Balsam of Wild Cherry, for consumption of the lungs, coughs, colds, asthma, bronchitis, whooping-cough, croup, influenza, hoarseness, pains or soreness of the chest, &c.

Directions.

The dose for adults should be one dessert or two teaspoonfuls three or four times a day, or one teaspoonful, taken more frequently if the cough is troublesome.

Those under twelve years of age may take one teaspoonful four times a day at any time when the cough is coming on. The balsam is generally more effective when taken with a little water.

Shake the bottle well before using.

For particular uses see pamphlet and general directions.

To guard against counterfeits, observe the *fac-simile* of the signature of I. Butts on the outer wrapper, and on the label inside the following:

H. WISTAR, *M. D.*

327 I, Charles H. Swan, a commissioner of the circuit court of the United States within and for the district of Massachusetts, do hereby certify that Seth A. Fowle was by me first sworn to testify the truth, the whole truth, and nothing but the truth;

that the deposition by him subscribed, as above set forth, was reduced to writing by myself in the presence of the witness and was subscribed by the said witness in my presence and was taken at the time and place in the annexed notice and agreement specified, and was continued from day to day, as above set forth; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit.

The reason for taking this deposition is that the witness lives more than a hundred miles from the place of trial.

In testimony whereof I have hereunto set my hand and official seal this 29th day of July, A. D. 1885.

[SEAL.]

CHAS. H. SWAN,
United States Commissioner.

Magistrate's fees	$40 00
Postage	41
	$40 41

Paid by complainants Aug. 3, '85.

328 And afterward, to wit, on the 20th day of November, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause clothed in the following words and figures, to wit:

Journal Entry W, 260.

SETH W. FOWLE & SONS
vs.
JOHN D. PARK & SONS. } Equity. 3624.

Upon application to the court leave is given the defendants to file their answer to the amended bill herein forthwith, and the same is filed; and, by consent, it is ordered that the reply filed herein to defendants' original answer be considered as a reply to defendants' answer to said amended bill.

And afterward, to wit, on the day and year last aforesaid, came the said respondents, by their said solicitors, and filed in the clerk's office of the court aforesaid in this cause their said answer to amended bill of complainants herein clothed in the following words and figures, to wit:

329 *Answer to Amended Bill.*

United States Circuit Court, Southern Dist. of Ohio.

SETH A. FOWLE, &c., Complainants,
against
JOHN D. PARK, &c., Defendants.

Answer to the amended bill of complainants.

The defendants, by way of answer to the amended bill herein, deny that the said complainants have sustained any damage in

consequence of the alleged violation by the defendants of any duty imposed upon them by the said contracts, either or any of them thereof; deny that the said complainants have lost any profits whatever by the alleged violation of contracts and entry thereunder, amounting to $15,000 or any sum whatever.

O'HARA & BRYAN,
For Defendants.

330 And afterward, to wit, on the day and year last aforesaid, came the said defendants, by their said solicitors, and filed in the clerk's office of the court aforesaid in this cause their certain exceptions to the depositions of S. N. Smith and of Seth A. Fowle and others, theretofore filed herein, clothed in the words and figures following, to wit:

331 *Defendants' Exceptions to Depositions of S. N. Smith, Seth A. Fowle, et al.*

United States Circuit Court, Southern District of Ohio.

SETH A. FOWLE, &c., *vs.* JNO. D. PARK & SONS.

Complainants' exceptions to depositions of defendants.

The defendants except to the deposition of S. N. Smith, taken on behalf of the complainant, as follows:

To the 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 82, 83, 84, 85, 86, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 100, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, and Exhibit 1 referred to; 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 171 question- and the answers thereto and each of them, because the testimony elicited is incompetent and irrelevant.

The defendants except to the deposition of Seth A. Fowle, taken on behalf of the complainants, on the following grounds, to wit:

To the 3, 4, 5, 6, 7, and Exhibit A; 8, 9, 10, 11, 12, and to
332 Exhibit B; 13, 14, 15, and to the copy referred to; 16, 17, 18, 19, 20, and writing referred to; 21, 22, 23, 24, 25, 26, 27, 28, 29, and the Exhibit C referred to; 30, 31, 32, and the Exhibit D; 33, 34, 35, and writing referred to; 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, and the copy referred to; 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, and the writing refered to; 60, 61, and to the copy referred to; Exhibit F, 62, and copy of letter referred to; Exhibit G; also to Exhibit H, 63, 64, 65, 66, 67, 68, 69, 70, 71, and to the Exhibits I and K; 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, and Exhibits L and M and N; 83, 84, 85, and to Exhibit O; 143, 144, 145, 146, 147, questions and answers thereto and to each of them, because the testimony elicited is irrelevant and incompetent.

333 The defendants except to the depositions of Stephen M. McKenzie, taken on behalf of the complainants, as follows: To the 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 questions and the answers thereto and each of them, because the testimony elicited is irrelevant and incompetent; also to the further emanation of said witness as follows:

To the 22 — and the copy of bill of lading referred to; 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 questions and answers thereto and each of them, because the testimony elicited is irrelevant and incompetent.

334 And afterward, to wit, on the 13th day of February, in the year of our Lord one thousand eight hundred and eighty-six, an entry was made upon the journal of the court aforesaid in this cause clothed in the following words and figures, to wit:

Journal Entry W, 303. *Decree.*

SETH W. FOWLE & SONS
vs.
JOHN D. PARK & SONS. } Equity. 3624.

This cause came on for hearing upon the bill of complaint, the answer and cross-bill of the respondents, and the evidence, and was argued by counsel. On consideration whereof, the court being fully advised in the premises, find that the complainants are not entitled to the relief prayed for in their said bill of complaint. It is therefore ordered, adjudged, and decreed that the complainants' said bill be, and hereby is, dismissed at their costs; and it is further ordered, adjudged, and decreed that the cross-bill of said respondents be, and hereby is, dismissed at their costs.

And afterward, to wit, on the 17th day of March, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause clothed in the words and figures as follows, to wit:

Journal Entry W, 335.

SETH W. FOWLE & SONS
vs.
JOHN D. PARK & SONS. } Equity. 3624.

335 This day came the complainants, by their solicitors, and in open court prayed an appeal from the decree entered herein on February 13th, 1886, dismissing complainants' bill, to the Supreme Court of the United States, which is hereby granted and bond fixed at the sum of five hundred dollars.

And afterwards, to wit, on the day and year last aforesaid, came the said complainants herein, by their said solicitors, and filed in the clerk's office of the court aforesaid in this cause their certain appeal bond clothed in the words and figures following, to wit:

Appeal Bond.

Circuit Court of the United States, Southern District of Ohio.

SETH W. FOWLE & SONS *vs.* JOHN D. PARK & SONS.

Know all men by these presents that we, Seth A. Fowle and Horace S. Fowle, partners as Seth W. Fowle & Sons, as principals, and James S. Austin and James W. Austin, as sureties, are held and firmly bound unto John D. Park, Ambro R. Park, and Godfrey F. Park, partners as John D. Park & Sons, in the sum of five hundred dollars, to be paid to the said John D. Park & Sons, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our
336 and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals. Dated this 17th day of March, 1886.

Whereas the above-named Seth A. Fowle and Horace S. Fowle, partners as Seth W. Fowle & Sons, have taken out an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such that if the above-named Seth W. Fowle & Sons shall prosecute their said appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

(Signed) JAS. S. AUSTIN. [SEAL.]
(Signed) JAMES W. AUSTIN. [SEAL.]

Sealed and delivered in presence of—
CHAS. M. HEPBURN.
C. R. NEVIN.

The above security is approved.

GEO. R. SAGE,
District Judge of the United States, S. D. O.

Affidavit of Sureties Annexed.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, James S. Austin, one of the sureties above named, do
337 solem-ly swear that, after paying my justs debts and liabilities, I am worth five thousand dollars in real estate in my own name situate in the county of Hamilton, in said district.

JAS. S. AUSTIN.

Sworn to before me the 17th day of March, 1886.

[L. S.] ROB'T C. GEORGI,
Dep. Cl'k U. S. Circuit Court, S. D. O.

JAN 29 1889
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1888.

SETH A. FOWLE and HORACE S. FOWLE,
Partners as Seth Fowle & Sons,
APPELLANTS,
vs.
JOHN D. PARK, AMBRO R. PARK and GODFREY R. PARK,
Partners as John D. Park & Sons,
APPELLEES.

No. 263.

BRIEF FOR APPELLANTS.

ALEX H. McGUFFEY, HENRY A. MORRILL, Counsel.

Supreme Court of the United States.

SETH A. FOWLE and HORACE S. FOWLE,
Partners as Seth Fowle & Sons,
APPELLANTS,
vs.
JOHN D. PARK, AMBRO R. PARK and GODFRY R. PARK,
Partners as John D. Park & Sons,
APPELLEES.

No. 263.

On Appeal from the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR APPELLANTS.

This action comes into this court on appeal from the Circuit Court of the United States for the Southern District of Ohio, wherein complainant's bill was dismissed and from which order of dismissal they appeal to this Court.

It was sought in the action to restrain the defendants, and each of them from selling, causing to be sold, or knowingly permitting the sale of what is known as Wistar's Balsam of Wild Cherry, within certain territory west of the Rocky and east of the Allegheny Mountains, in violation of certain contracts and to recover damages for such violation and sales.

From the statements of the bill, the evidence and the admissions of the answer, the following facts clearly appear:

In 1844, one Lewis Williams compounded the preparation

in question and discovered its virtue, he becoming, thereby, the sole proprietor and, alone, having knowledge of the ingredients thereof.

In May, 1844, he disclosed the secret of the mode of its preparation to one Isaac Betts, and conveyed and transferred to him the exclusive right to manufacture and sell this medicine in certain described territory east of the Allegheny Mountains. In March, 1845, said Betts transferred all his rights to Seth W. Fowle, said Fowle agreeing not to sell said Balsam for a less sum than $7.20 net, per dozen, except to agents for a whole State or territory, who, in turn, were not to sell for less than that rate.

All the rights thus acquired by Fowle have passed to the plaintiff by purchase and inheritance.

See Exhibits *B. I. K. and C.* and testimony of Seth A. Fowle, *Record*, pp. 103, 115, 120, 122, 131 and 135.

During the year of said transfer to Fowle, or, possibly, the previous year, Williams disclosed the secret and mode of this preparation to Sanford & Park, and transferred to them a similar right to that given Betts, to manufacture and sell said preparation in the then territory of the United States, west of that secured as aforesaid to Betts, they agreeing not to sell on the territory of the latter, and the right so acquired by Sanford & Park has passed to the defendants. See p. 16 of *Record* and answer of defendants.

It further appears that in 1864, in consideration of $5,000 paid to the defendants, a question having arisen as to the rights of the parties in the territory west of the Rocky Mountains, the defendants transferred to the complainants and their assigns all interest in, or right to the sale of said medicine west of the Rocky Mountains, and, also, all interest in or right to the good will of selling said Balsam in said territory, agreeing that they

would neither sell the same nor promote such sale therein, and would assure to the plaintiff, so far as they could, the exclusive sale thereof in such territory free of all competition, by or under themselves, and that they would not aid or abet any person in doing anything to the prejudice of such exclusive sale. *Exhibit* 7, p. 128 of *Record*.

Under this state of fact, the complainants claim that they have the exclusive right to sell said Balsam west of the Rocky Mountains, and east of the Allegheny Mountains, especially, as against the defendants, and aver in their bill that the latter have violated and are violating said right in selling, or promoting the sale of said Balsam in both of said sections, or in knowingly aiding and abetting others in such sales, and that they are injuring them greatly thereby, and that they the said complainants are entitled to the aid of the Court to prevent such violation and to an assessment of damages for the injury which has been so done. The questions for determination in this court would seem to be these:

1. Have the defendants knowingly sold or promoted the sale of this article within the prohibited territory, or sold with reason to know that it was to be sold in such territory?

2. If so, are the complainants entitled to an injunction and account? Both these questions, it is understood, the Court below answered in the negative.

As to sales; we have bearing upon this question, certain testimony taken in New York, that of one Smith of Dayton, O., and that of one of the defendants, and, another party in Cincinnati.

In the New York testimony, we find that J. H. Francis, on pp. 22, 27, of *Record*, says, that he was with Henry, Curran & Co. for seven years, immediately prior to 1876. He says that Park's

Balsam was kept in stock during this time. He recognizes two of Park's invoices, one dated August 19th, 1875, and the other October 26th, 1874. These bills are attached to his testimony as Exhibits 1 and 2, and embrace the following items of Wistar's Balsam:

5 gross	at	$84 - - - - - - - -	$420
8 "	"	- - - - - - - -	672

These bills certainly tend to establish the sale of $892 worth of this article in the prohibited territory.

But, further on, we shall find that this is clearly established by the books of Park & Sons, and the testimony of the witness Park. He admits that the bills are genuine as coming from their house, and that the same items appear in their ledger. See Parks' testimony, p. 94, *Record*.

These bills were rendered directly to the New York parties. The Balsam was purchased and bills checked in the regular course of business as the goods were sold and delivered. This is certainly proof of sales in the prohibited territory. See pp. 26, 27 of the *Records*. This same witness says on p. 28 of the *Record*, that Henry, Curran & Co. sold all over the United States, and, there is proof, that it was sold by them in the prohibited territory, and there is an entire absence of proof that it was sent to be sold elsewhere than in such territory.

John F. Henry himself testifies on page 29 of *Record*, that they kept Park's Balsam in stock, up to within the past five or six years and, that they bought directly from Park. This establishes the fact, that it was not shipped for sale in the defendant's territory, but was sent for the general purposes of the Eastern trade without regard to where it might be resold. Henry says on p. 34 of the *Record:* "We sold it east of the Alleghenys," and he specifies parties in New York to whom they

sold it. But, aside from this, general sales to Henry, Curran & Co., were in direct violation of plaintiff's right, for they had exclusive right to sales in New York as within the territory embraced in the original transfer to Betts.

But, further, Henry says on p. 30 and 31 of the *Record*, that he recognizes the marks on an invoice of Park & Sons of July 12th, 1876, and one of September 25th, 1876, as made by one of his employes, and the proof of these sales is confirmed by Park & Sons ledger accounts, as testified to by Park; p. 94 of *Record*.

The bills are attached to Henry's deposition as Exhibits 3 and 4, and show the one, 5 7-12 dozen of Balsam at $6.67—$37.24, and the other, 5 7-12 gross of Balsam at $84—$420.

The ledger account, referred to, contains a charge on August 19th, 1875, for merchandise to Henry, Curran & Co., of $420, and on September 25th, 1876, of $529.27, which is only sixty cents more than the aggregate of the bill of September 25th, $420 of which is for Balsam, pp. 94, 30 and 31, of *Record*. This difference may be a mistake in printing the *Record*, or in making the bill or entries.

We submit that without doubt they refer to the same transacton, and thus we have proof of two other sales, to parties in the prohibited territory amounting to $457.24.

And, further, Henry testifies on pp. 37, 38, that they sold Parks' Balsam in New York from time to time, kept it on their catalogue, and "that Park & Sons knew that they kept it in stock."

Again, in support of the claim that this Balsam was sold to supply the Eastern market, or at least did supply it, we have the testimony of Fred. M. Robinson, p. 40 of *Record*, that he dealt in this Balsam in New York in 1880, though he is unable to say

from whom he bought it. Complainants did not furnish it, presumably defendants did.

Again, we show sales, or at least, one sale, 2 dozen, directly to Crittenden of New York, in the year 1880. James Higgins, an employe of Crittenden, testifies p. 42 of *Record*, that he recognizes one of Park & Sons invoices covering a lot of Balsam, dated August 15th, 1880, indicating a sale direct to Crittenden. This sale is established beyond controversy by the testimony of Park and their books. pp. 82, 83, of *Record*.

In the same connection, Park admits the bill marked as exhibit 4 in the New York deposition. In these same depositions we have testimony tending to show that the defendants were responsible for various shipments of their Balsam to California, through Coffin, Reddington & Co., of New York.

Isaac S. Coffin, a member of the firm says, on pp 45 and 46 of the *Record*, that he attended to the purchases and shipments for the California market, and that, for seven years, he had purchased Park's Wistar's Balsam from S. N. Smith & Co., of Dayton, commencing 1877, the last purchase being in 1883. Further, he says, on p. 46, that purchases were made under orders to ship direct to California. In other words, orders from California to them were filled by sending them to Smith & Co., who shipped the Balsam directly to California in the name of Coffin, Reddington & Co. The significance of this will be more apparent when we come to consider the fact disclosed by the testimony, that this Balsam was partly shipped directly to California, by Park & Sons on the orders of Smith & Co., with the latter of whom Park & Sons had close business relations.

The witness proceeds to state, that he is able to trace ten shipments of this kind directly to California, upon their order, through Smith & Co., the bills being rendered to them by Smith.

& Co., and that they allowed Smith & Co. $7 a dozen for it, less freight to California; or, in other words, Smith & Co. furnished it for $7, less freight.

Coming now to the testimony of S. N. Smith, he admits that within five years then last past, he had shipped 9 gross of this Balsam to California on the order of Coffin, Reddington & Co., to a branch of the New York house of that name, embracing nine shipments, p. 54 of *Record*. On p. 60 he says that these shipments to the Pacific Coast were as follows:

April 23, 1879,	2 gross	$160.00
January 1, 1880,	1 "	77.86
September 14, 1881,	1 "	77.70
September 1, 1882,	1 "	77.68
February 1, 1882,	1 "	77.68
March 6, 1883,	1 "	78.38
May 19, 1883,	1 "	78.37
December 12, 1883,	1 "	78.37
Amounting to the sum of		$706.04

Also, he says, that on April 11, 1883, 1 gross was shipped to John Helm & Co., California, p. 60 of *Record*.

Here were have ten gross shown to have been shipped to the prohibited territory, amounting to near $800, indicating a regular supply and course of business, continuing up to within three months prior to the date of the commencement of this suit.

On p. 57 of the *Record*, the witness says that he did not usually keep the article in stock, but ordered it from Park & Sons, and sometimes had the goods shipped directly by them, p. 61. True, they rendered the bills to him, but he testifies that while they rendered bills charging $84, and $87 per gross in some instances, or $7 or more per dozen, he, in fact, paid them only

what he received, which in all cases seems to have been $7 per dozen, less the freight to California. And, further, he says that in no case did he receive any profits on the transaction.

Now certain deductions follow from this. *First.* In some cases, probably in all, the defendants knew the goods were going to the prohibited territory, for they shipped some of them direct, as will more fully appear hereafter, sending the bill, however, to Smith & Co. to avoid detection, it would seem. Besides, Smith & Co. were accounting to them on the basis of a deduction of freight corresponding to the charges to California, which was four or five times the amount charged to Dayton. From this they knew, or ought to have known, where the Balsam was going.

Second. If these sales were to Smith & Co. in fact, then they were for much less than $7 per dozen and in violation of the contract, for there is no pretense that Smith & Co. were agents for a State or Territory.

Third It is incredible that Smith & Co. as independent dealers, would pay Park & Sons the precise sum, at which they sold realizing no profit for themselves. Business men do not thus conduct their affairs.

Can there be any doubt that the mode of conducting there transactions, between Smith & Co. and defendants, was a mere device in the interest of the defendants, to supply the prohibited territory without detection?

Can any other rational construction be put upon it, than that Smith & Co. were defendants' agents in these sales, and that, through this method, they were supplying, indirectly, a market which they had no right to supply, and did not dare to supply directly?

What possible reason can there be for Coffin, Reddington & Co. ordering from Smith & Co. for the California market in-

stead of Park & Sons, except to avoid detection in violating the contract, on the part of Park & Sons?

But, still further, it appears from this deposition, p. 62 of the *Record*, that on June 20th, 1877, Smith & Co. shipped ten gross of this Balsam to Coffin, Reddington & Co., California, for the sum of $776.40, and on July 26th, 1878, 5 gross for $383.43—that is, in each case for an amount less than $7 per dozen equal to the freight to California, which Balsam they procured from the defendants, paying them, as in the former cases, the precise sum they received, net. Whether shipped directly by Park & Sons he professes to be unable to say.

It will hardly be questioned that in these transactions, Smith & Co. bore the same relation to the defendant as in the former, whatever that was. But let us see what light Park's testimony and books show upon the question.

This is derived from the testimony of Godfrey F. Park, one of the defendants, as found in his deposition. It will be seen that he was a reluctant witness, called by us from necessity, and such facts as were obtained from him were procured with great difficulty. And the defense have been careful not to call any member of the defendant firm, apparently, being unwilling to expose them to the searching inquiry, permissible under rules applicable to cross-examination. Certain significant facts meet us at the threshold of Parks' testimony.

1. There is an absence of, or failure to produce, what are known as triple sheets, which should contain the names of the parties to whom shipments were made; p. 83 of *Record*.

2. The absence of, and failure to produce certain sales books, covering the period during which the evidence shows, that many of the questionable shipments were made; p. 87 of *Record*.

3. An unwillingness to disclose, and a professed ignorance of, the business relations of the firm with Smith & Co., of Dayton, through whom a large number of these alleged wrongful shipments were made.

4. An entire absence of, or professed inability to produce, any correspondence with Smith & Co. or others with respect to shipments of Balsam which were made to the prohibited territory, either directly or indirectly.

Turning to the deposition of Park, it will be seen on p. 90 of, *Record*, that the witness declines to say that they have not shipped this Balsam directly to California, upon the order of Smith & Co., while Smith, it will be remembered, testifies that this was done in some instances, and possibly, in most cases.

On p. 77 of the *Record*, this witness says, that in 1879 they put up as collateral with Smith & Co. about $500 worth of this Balsam, which was all sold on their account, and further, that they kept it in stock at one time with Smith & Co , to be sold on their account.

This is weighty evidence to support our theory, that they intentionally, and knowingly, supplied the California market through Smith & Co., the latter acting either on his own account, with their knowledge, or as their agent, in which case, they would be responsible without regard to whether they knew it or not.

Further on, it will be seen that the books of Park & Sons confirm our claim, that the defendants were making these shipments themselves largely, acting in the name of Smith & Co. to avoid detection.

Indeed, on p. 93 of the *Record*, when pressed, the witness declined to say, that the entries on the sales books in the name of Smith & Co., necessarily show to whom the article was shipped, and, in answer to a direct question, No. 124, p. 82 of the

Record, he says he don't know whether when charged to Smith & Co. the article was shipped to him or to other parties.

It is a significant fact that no member of the firm was called nor any triple sheets produced to show to whom these shipments were made. On p. 82 of the *Record*, the witness admits a shipment of 2 dozen Balsam to C. N. Crittenden, of New York.

On p. 83 he virtually admits sales, directly, to parties in New York, as per invoices attached to the New York depositions, as Exhibits 3 and 4.

On p. 84 of the *Record*, the witness again declined to say that they did not ship to California on Smith & Co.'s order.

On p. 86 we have positive evidence from defendants' sale book, that $420 worth of this Balsam charged to Smith & Co. was shipped directly to Coffin, Reddington & Co. The language of the entry, in part, is: "Shipped Coffin, Reddington & Co., S. F., Cal." This appears in the teeth of the repeated statement of the witness Park, that he had no knowledge this had been done. We need go no further for evidence, that this whole business with Smith & Co. was a sham and a device on the part of the defendants to cover their tracks. We have a right to say, "false in one, false in all." And it is to be noticed, that this sale is distinct from, and at a later date than, the two sales of $420 each, made to Henry, Curran & Co, on August 19th, 1875, and September 25th, 1876, respectively. Again, on the same page of the *Record*, we have testimony, from the sales books, of an entry of 2 gross of this Balsam, charged to Smith & Co. at $80 per gross, or $4 below the stipulated price, showing that this was either shipped to other parties, to whom the freight was allowed, or that the contract with the plaintiffs was violated by selling to Smith & Co. below such stipulated price. For the witness admits that at that time freight to Dayton was only 75

cents per gross. If we weigh these facts, in connection with Smith's and Coffin's testimony, touching shipments to California, can there be any doubt that this also was shipped to the prohibited territory with the knowledge of Park & Sons?

Again, on pp. 86 and 87 of the *Record*, the witness admits that there appears in their ledger a charge against Smith & Co. June 20th, 1877, of $776.40 for merchandise. Smith testifies that on the same day he shipped to Coffin, Reddington & Co., ten gross of Balsam for the sum of $776.40, p. 62 of *Record*. Was not this in substance a sale by Park & Sons? Smith & Co.'s and Park & Sons, entries are precisely the same in date and amount. If Smith & Co. had sold this on their own account, would they not have charged a commission or received a profit? This transaction can be explained only on the theory that it was Park & Sons in the name of Smith & Co. And the former have been careful that we should not get hold of either the sales books or the triple sheets, of this date.

On pp. 86 and 94, the witness is made to show, from the books a sale of 2 gross to McKesson & Robbins, of New York, direct, and there is evidence in the New York deposition of other sales to the same parties, p. 40 of *Record*.

On p. 89 of the *Record*, the witness shows from the books three other sales charged to Smith & Co. as follows:

September 14th, 1884, - - - - -	$77.70
January 30th, 1882, - - - - -	77.68
December 7th, 1883, - - - - -	87.00

The first and second of these correspond in dates and amounts with shipments of Balsam, which Smith says he made to California, p. 60 of *Record*.

Here, again, it appears that Smith & Co. made no profit, and under these circumstances we have a right to infer that they were acting for Park & Sons.

On p. 89 of the *Record*, in connection with this same deposition, is brought out the fact that the witness knew the average amount of freight charged per gross on Balsam shipped to California, to-wit, about $6.60, which deducted from $84, the contract sales price per gross, leaves $77.35, substantially the amount, in all cases received by Smith & Co. on the California shipments, and by them paid to Park & Sons.

This all tends to show that they were not selling this Balsam to Smith & Co., but in fact to the California parties, and that they knew precisely where it was going. This is the only rational explanation of their charging Smith & Co. in every instance an amount corresponding to the usual rate per gross, less the then freight to that point. On p. 89 the witness admits, in answer to question 211, that Smith & Co. had the goods in stock for them, at times, and were accustomed to ship the goods, notifying them of the amount and rate of freight, whereupon they were charged the usual price, less the freight on each shipment.

In short, Smith & Co. acted as their agent, and they knew or, ought to have known, from the amount of freight that was reported, that these shipments were to California. Clearly, this whole arrangement was a device and a very transparent one. On p. 90 the witness testifies from the ledger to a charge on July 22d, 1878, of $383 against Smith & Co. for merchandise. Smith testifies, in answer to question 154, in his deposition, p. 62, that, at the same date, he charged this amount to Coffin, Reddington & Co., California, for 5 gross of Balsam. Here again we have evidence of a sale by Park & Sons, through Smith & Co. in violation of their agreement. In this same connection, p. 91, there is a charge against Smith & Co. shown, for 1 gross of Balsam, less freight, which corresponds in date and amount with a shipment by Smith & Co. to California, p. 60 of *Record*.

On p. 91 there is another charge, testified to as in the sales book, corresponding to Smith & Co's., testimony of a shipment to California, p. 60 of *Record*.

On p. 92 are other sales book entries corresponding with California shipments made to Smith & Co.

We submit that the proof is clear and overwhelming in the absence of explanations, which they have had the fullest opportunity to make, that all these shipments by Smith & Co. to California were in fact made through the defendants, or, at all events, were made under such circumstances, that they knew, or ought to have known, that they were being made.

On pp. 92 and 93 the witness, Park, testifies that there was an understanding between him and Smith about these matters that nowhere appeared on the books. From all he says, refuses to say, and leaves unsaid, on this point, the inference is, that Smith & Co. is a mere name to cover the acts of the defendants, violative of their agreement.

But, still further, on, pp. 95 and 96 of the *Record*, Park testifies to four shipments of Balsam directly to Georgia—within the prohibited territory. The sales were made by one of the defendants, in the years 1879, 1883 and 1884. These, of course, are admitted violations of the contract. And the same is true of a shipment made to Philadelphia in 1880, testified to on p. 98 of the *Record*. There is still another important fact disclosed on p. 97 of the *Record*, in this deposition. It is this; that in July, 1880, an entry was made in defendants' sales book of a shipment of one gross of this Balsam to Coffin, Reddington & Co., and then this name was carefuully erased and the name of Smith & Co. substituted. If Coffin, Reddington & Co. were not known to be connected with this transaction, why should their name creep in here? How, even, were defendants otherwise

familiar with the name? No explanation is offered. Undoubtedly they were the real parties to the transaction, and by accident the mask was dropped for a moment and a bungling attempt made to replace it. Before dismissing this branch of the case, we would add that the chief difficulty the Court professed to find was over the question whether violations of the contract were shown with sufficient clearness. True, in their answer defendants specifically denied under oath such violation. But we did not call for sworn answers to our interrogatories, and consequently they are not testimony against us. And their testimony by deposition does not support these denials. On the contrary, we submit, that in many cases it is a direct admission of such violation, and in others, while not amounting to a direct admission, it indirectly establishes it with moral and legal conclusiveness.

The only member of the defendant firm called was Godfrey F. Park. His testimony throughout was evasive, hesitating and contradictory.

Recurring again to the record, on this point, on p. 77, he carefully refrains from denying that they had shipped Balsam to Coffin, Reddington & Co. on the order of Smith & Co., but when asked, contents himself by saying, "he don't recollect." While in his answer to this same question by interrogatory, he swears positively that they had not.

On p. 78 of the *Record*, he refuses to say that they had not shipped Balsam to California on the order of Coffin, Reddington & Co., of New York, while he unqualifiedly answered "no" to the same question, as on interrogatory. On p. 70, he states that he has no recollection of shipping five gross of Balsam to Henry Curran & Co., September 25th, 1876, while he subsequently shows by the books that they did make this shipment. This he also had denied in answer to an interrogatory, thus being guilty

of wilful falsehood, or gross recklessness in his statements. And the same may be said in regard to the shipment to Crittenden, which he finally admits.

On p. 82, he declares after examination of the books, when asked whether they have the name of Reddington & Co. on them, that "there is no charge against them."

This answer was intentionally evasive, for subsequent investigation showed a memoranda on the books, as will be remembered, to the effect that a shipment ordered by Smith & Co. was shipped "to Coffin, Reddington & Co., S. F., Cal.," *Record* p. 86.

On p. 84 he testifies that no Balsam had been sold to Smith & Co. or any other party at less than $84 a gross, while on p. 86 he admits to a sale to Smith & Co. for a fraction less than $77 per gross, and another for $80 per gross.

On the same page he admits a sale of one gross to McKesson & Robbins, New York, direct, in the teeth of his sworn answer to the bill, that no Balsam had ever been sold to the prohibited territory.

Again, on p. 80 he admits to sales for $77.70 and $77.68 per gross, and on p. 91, at $77.68, all below the stipulated price.

On pp. 92 and 93 are statements by the witness Park in regard to the relations between the defendants and Smith & Co. which seem to point conclusively to that of principal and agent.

He speaks, as we have seen, of an arrangement, extending over a period of six or seven years, by which his firm kept stock in Dayton for their convenience in shipping.

No charge was made Smith & Co. when the Balsam was shipped thither; Smith & Co. filled the orders, reported the sales and freight, and were charged the regular rates, less freight. How the account was kept, the witness fails to fully explain. He admits, that the transactions were not fully set forth on the books,

and that no member of the firm, but himself, knew much of the arrangements.

He was unable to state whether the Balsam was in stock there at the time of his testimony, or how much was there at any one time.

Why this indefiniteness of knowledge? Why such circumlocution in filling orders? Can there be any doubt that Balsam was being shipped to the prohibited territory from this stock? And while this was going on, their attention was being called to the fact, that their Balsam was appearing in the California market, p. 130 of *Record*.

They took no heed of this though they had agreed to do all acts, upon request, reasonably necessary to confirm the complainants in the enjoyment of their rights.

Besides, there is the unexplained entries, on their books, showing one shipment direct to California, and other sales to parties in New York, Georgia, and Philadelphia. To these last three points there was not less than $1,500 worth shipped direct. The proof is conclusive as to most of these direct shipments.

How then, can it be said, that we have not satisfactorily shown substantial violations of the contract in question?

If there was any explanation possible, of these sales, consistent with the observance of the contract, the defendants had it within their power to offer it. But they have failed to attempt it.

Now, from a careful analysis of the testimony above referred to, to-wit: The New York depositions, the deposition of Smith, of Dayton, and that of G. F. Park, with the defendants books and the deposition of a member of the house of J. N. Harris & Co., we submit that the following sales are established by the testimony in violation of the defendants contract, to-wit:

Through S. N. Smith & Co.—

June	20	77	Coffin, Redington & Co.	10	gross	$776 40
July	26	78	do	5	"	383 43
Sep.	27	79	do	2	"	160 00
July	1	80	do	1	"	77 86
Sep.	14	81	do	1	"	77 70
Feb.	1	82	do	1	"	77 68
Sep.	7	82	do	1	"	77 68
Mch.	6	83	do	1	"	78 38
Mch.	19	83	do	1	"	78 37
Dec.	12	83	do	1	"	78 37
April	11	83	John Hahn & Co.	1	"	83 18
			Total	25		$1949 95

Through J. N. Harris & Co.—

June	2	83	Kirk, Geary & Co.	1	gross	$79 80

Sold John F. Henry Curran & Co.—

Oct.	26	74	Shipped to New York	3	gross	$252 00
Aug.	19	75	do	5	"	420 00
July	12	76	do	5 1/12	doz.	37 24
Sep.	25	76	do	5	"	411 00
			Total			$1120 24

Sold C. N. Crittenden—

July	19	80	Shipped to New York	1-6	gross	$14 50

Sold to McKesson & Robbins—

Aug.	27	79	Shipped to New York	1	gross	$84 00
Feb.	6	81	do	1	"	87 00
Jan.	19	88	do	1	"	87 00
			Total			$258 00

Sold French, Richards & Co—

Aug.	9	80	Shipped to Philadelphia	1/2	gross	$42 00

Sold Peacock & Gates—

Nov. 25 79 Shipped to Atlanta, Ga..... .. ½ doz. $3 68

Sold Hunt, Rankin & Lamar—

May 11 80 Shipped to Atlanta, Ga..... ½ gross $43 50

Sold to J. Bradfield—

Sep. 28 83 Shipped to Atlanta, Ga..... ½ gross $43 50

Sold Howard & Chandler—

Feb. 5 84 Shipped to Atlanta, Ga..... ... 2 doz. $14 50

Adding these quantities and prices and it appears that 44½ gross were sold, and that the sum of $3,568.77 was the price it brought, net. The actual cost of this amount, according to the testimony, p. 112 of *Record*, *Answer* No. 56, was $1.75 a dozen, or $1,059.60 for the whole amount. This deducted from $3,568.77 amount of sales traced, leaves a loss of profit of $2,509.66, to say nothing of the necessity caused thereby of reducing prices on account of competition, and of the cost of extra advertising, p. 110 of *Record*.

In regard to the amount thus shown to have been sold, we submit that in view of the defendants' reluctance to produce their books, and the admitted loss, and probable suppression of some of them, which would have thrown light on this matter of sales, there are probably numerous sales which we have been unable to trace.

And in this connection we further submit, that even if the defendants did not have actual knowledge that Smith & Co. were shipping this Balsam to California, still they have violated their contract; for they agreed upon reasonable request, and at any time to do such acts as might be necessary and expedient, to enable these plaintiffs to realize and enjoy the full benefit and advantage intended to be assured to them in such contract.

It is clearly shown, by the testimony, that the defendants were repeatedly requested to prevent these shipments, especially

to New York and California, pp. 130 and 114. But they took no notice of these requests. It was their duty to know, after this, what Smith & Co. were doing. They were put on inquiry.

In contemplation of law they are chargeable with knowledge of that, which they ought to have known.

II.

The defendants having sold this article in the quantities and places aboved named and being engaged in such sales at or near the time this suit was brought, the next question is, are the plaintiffs entitled to an injunction ?

The question must be determined upon the construction and effect to be given to the contract upon which we rely, and the law touching the remedy for the violation of such a contract.

The contract of 1869 between the parties hereto, or their assignors, is very specific as to the territory west of the Rocky Mountains, and the contract between Williams and Park is equally specific as to the Eastern territory. In the former the defendants agree, for a consideration, that the plaintiffs shall have and enjoy "the sole and exclusive right of selling said medicines within said territory, so far as they can assure the same, free from any competition or interference by them, or any one under them, or by their authority, permission, or aid, either direct or indirect"—and that they will not be concerned, directly or indirectly, in the buisness of selling or in any way promote the sale of said medicine, in competition with the plaintiff—or knowingly aid or abet any other person to do any thing to prejudice or interfere with the business, or the sale of the same, within said limits, by the plaintiffs.

Nothing could be clearer than that the parties to this agree-

ment intended it to be a protection against that, of which we complain. And it is such a protection, unless it is a contract which can not be enforced.

We submit that, according to authority, such a contract is enforceable.

As a general principle, parties may make such contracts as they please. The only question arising is whether this contract violates public policy.

In the first place, the subject matter consists of a compound which involves a secret in its preparation, which the law recognizes as property. The parties were not dealing with an ordinary commodity, the value of which depended upon the labor and meterial employed, but this depended chiefly, upon the secret in the mode of its preparation. *This, alone, warrants large latitude in its protection by contract.*

Further, the contract does not deprive the public of the benefit of this secret, nor those who possess it of the benefit thereof. The evidence shows that, though this contract be enforced, no part of the country is deprived of the preparation, nor is any party, possessing the secret, debarred from its use. They are simply circumscribed as to the territory within which they may sell. True, it may operate to affect the price at which the public may obtain the preparation. But this does not render it invalid.

The authorities upon this subject are quite numerous, and strongly support such a contract as this.

In *Benwell* v. *Innes*, 24 Beavans 307, decided in 1857, it was held that when a milkman took another into his service under an agreement with the milkman, his assigns and successors, not to carry on a similar trade within three miles, the contract was enforceable in favor of the milkman's assignee, by injunction. The right to relief turned upon the reasonableness of the restriction.

In *Harmes* v. *Parsons*, 32 Beavans 328, the Court restrained the violation of a contract not to carry on the business of horse hair manufacture, within two hundred miles of Birmingham. The covenant not being an absolute prohibition, the Court said: "the area of exception is not so excessive as to vitiate the contract."

Coming to the case of *Leather Cloth Co.* v. *Lorsont*, 9 Eq. (L. R. S.) 345, decided in 1869, we find it on all fours with that at bar.

The suit was to restrain the defendant from carrying on the manufacture and sale of leather by a secret process, in contravention of a contract not to carry on such business, directly or indirectly, in any part of Europe, nor to the best of his power allow others, than the plaintiff, to do so.

The Court held, in an able opinion, adopting the elaborate argument made by Sir Roundel Palmer, as counsel, that in view of the subject matter of the contract the restriction was not greater than was necessary for the protection of the plaintiff, and that it should be enforced.

Much stress was laid upon the fact that the value of the subject matter rested largely upon the secret involved. And counsel cited,

Bryson v. *Whitehead I. Simons and Stuart* 74, *and*

Rannie v. *Irvine* 7 Man. & G. 969,

in support of these two proposition—

1 That a trader may sell a secret of business in his trade and restrain himself by contract, generally, from using it for his profit.

2 That to prevent him from so restraining himself would operate as a restraint of a very serious kind.

And the Chancellor says on page 354,—"the sale of a secret has been held to be perfectly good, with a stipulation unlimited as to time and place, as to communicating the secret or dealing with it so as to interfere with the purchaser." Here the seller and his son-in-law possessed the exclusive secret of a mode of dying stuffs. It was agreeded not to disclose it to others, nor use it for twenty years. The contract was held good.

In *Jones* v. *Lee*, I H. & N., 189, the Court held that a covenant not to make or vend a particular article, in England, the use of plaintiff's invention, ~~without making~~ for a period of fourteen years, was good.

In *Allsop* v. *Wheatcroft*, 15 Eq. (L. R. S.) 59, it was held that a covenant by a traveller for a firm of brewers, that he would not "during his service nor for two years thereafter, directly or indirectly, sell, produce orders for, or recommend, or be anywise concerned or engaged in the sale or recommendation &c., of ale or porter" was void for being unlimited as to space.

As to this case—1st. It is not broad enough to conflict with our position with respect to the case at bar, for in the latter the restriction is limited in space.

But 2nd. This last case is unquestionably over-ruled by the more recent case of *Rouisillion* v. *Rouisillion*, 14 Ch. Div. (L. R.) 351, decided in 1880.

Here was a covenant by an employee not to engage in the champagne trade for others or himself, for a period of ten years, there being no limitation as to space.

Fry J., delivered an elaborate opinion, going over all the authorities, saying:—"there is no absolute rule that a covenant in restraint of trade is void because it is unlimited in regard to space, the question in each case is whether the restraint extends further than is *necessary* for the *reasonable protection* of the *covenantee*.

If it does not do that, the performance of the covenant will be enforced, though the restriction is unlimited as to space."

These propositions were sustained by copious reasoning and many authorities. Among them, that of

Tollis v. *Tollis*, I E. & B., 391

is important, as applied to the case at the bar.

And we think the American authorities are in full accord with those above cited.

The case of

Peabody et al. v. *Norfolk*, 98 Mass., 452, is in point.

It was there said that "one who invents or discovers, and keeps secret a process of manufacture, whether proper for a patent or not, has a property therein which a Court of Chancery will protect, against one who, in violation or breach of a contract, undertakes to apply it to his own use."

This was a case of a promise for a consideration not to disclose or use a secret process, invented by the plaintiff, for making gum cloth. The Court held, that there was a remedy by injunction, and this in favor of the promisee's executors, and that it involved a property right which passed under the general provisions of a will. The Court say such a secret or process of manufacture, whether a proper subject of patent or not, is a property right which a Court of Chancery will protect. The Court cites the case of *Bryson* v. *Whitehead*, I S. & S. 74 as sustaining this doctrine—also *Green* v. *Floger*, *ib.* 398,—the one involving an agreement for the exclusive use of a secret in dyeing, and the other the secret of making a medicine, which secret the defendant held in trust under a will for the benefit of his brothers and sisters.

Also, there was cited the case of *Morison* v. *Moat*, 9 Hare 241, where the Court restrained the use of a secret in compound-

ing medicine, the action being between the son of one and the legatees of the other, of the original parties to the contract, by which it was claimed the secret was protected.

In *Vickery* v. *Welch*, 18 Pick. 523, the Court enforced a bond to assure to the obligee the exclusive right to the art or secret manner of making chocolate, declaring that such a contract was not in restraint of trade.

In the *Morse Hoist Drill Co.* v. *Morse*, 103 Mass. 73, the Court restrained the violation of a contract "not to aid, assist, or encourage in any manner, competition with a business dependent upon a process" which the defendant had sold the plaintiff, citing with approval the case above referred to from 9 Eq. 345.

The Court says, "public policy requires that when one has by skill or *other means*, obtained something that he wants to sell, he should be at liberty to sell it in the most advantageous way in the market, and in order to enable him to do this, it is necessary that he should be able to preclude himself from entering into competition with the purchaser, provided the restriction be not unreasonable. He may not have any more restraint than is necessary for the benefit of the purchaser, but to that extent he may have it."

And, again, the Court says, "The defendant could not have obtained the consideration which was paid him, if it had been understood that this contract which he has violated had no validity. He is appropriating to himself a part of that which he has sold to the plaintiffs and which is valuable property to them."

The limit beyond which courts hesitate to go in sustaining contracts in restraint of trade, is very clearly stated by Mr. Justice Bradly of this Court, in

Oregon Steam Nav. Co., v. *Winsor*, 20 *Wall* 64.

"There are two principal grounds," says he, "on which the doc-

trine is founded, that a contract in restraint of trade is void as against public policy. One is the injury to the public by being deprived of the restricted party's industry. The other is the injury to the party himself by being precluded from pursuing his vocation, and, thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire section or country. The country suffers the loss in both cases, and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objections, is decidedly against public policy. But if neither of these evils ensue, and, if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objections and may be enforced."

Surely neither of these objections pertain to the restrictions in question. The only question here is, are the mutual restrictions unreasonable in view of their object and their subject matters?

In the case cited from 14 Ch. Div. R. 351, Fry, J., quotes from Chief Justice Tindal, in *Hitchcock* v. *Coker*, 6 *A. & E.* 454, who, speaking for the Court, says: "We agree in the general principle adopted by the Court of (Queen Bench), that where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint, must be considered as unreasonable in law, and the contract which would enforce it must be therefore void," and adds, "If therefore, the extent of the restraint is not greater than can possibly be required for the protection of the plaintiff, it is not unreasonable." And Fry, J., adds, "that the cases in which an unlimited prohibition has been

spoken of as void, relate only to circumstances in which such a prohibition has been unreasonable, and can have no application, except where the subject matter of the sale or contract is local.

In the case at bar, the subject matter is general, or even universal, besides, the restriction is only partial as to space, though perhaps indefinite as to time. But as said in *Mitchell* v. *Reynolds*,

I. *Smith's Lead. Cases*, 660. "If the restriction as to space be not unreasonable, the circumstances that it is indefinite as to time, does not invalidate the contract."

As specially applicable to the contract in question, we refer to *Smith's Appeal*, 113, Pa. St., 579, 590, where it is said: "Public policy requires that when when a man has * * obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market, and in order to enable him to sell, it may be necessary that he should be able to preclude himself from entering into competition with the purchaser. In such case the same public policy enables him to enter into any stipulation, however restrictive it is, provided the restriction in the judgment of the Court, is not unreasonable, having regard to the subject matter of the contract."

In this case, a contract not to engage in the manufacture of ocre in the County of Lehigh was held valid, and, that injunction was the proper remedy against its breach.

See also, *Walds Pollock on Contracts*, p. 316 and cases there cited; also a table in connection therewith showing the restrictions that have been held reasonable, the latter of which we transcribe for the convenience of the Court:

Name and Date of Case.	Trade or Business.	Extent of Restriction in Time.	Extent of Restriction in Space.
1855, Dendy v. Henderson, 11 Ex., 194.	Solicitor.	21 years from determination of defendant's employment as a managing clerk to plaintiff.	21 miles from Parish of Tormoham, Torquery.
1856, Jones v. Lees, 1 H. & N., 189.	Manufacture or sale of slubbing and roving frames not fitted with plaintiff's patent invention.	Continuance of defendant's license from plaintiff, to use and sell the patented invention.	England.
1857, Benwell v. Inns, 24 Beav., 307.	Cowkeeper. Milkman, Milkseller, or Milk Carrier.	Continuance of defendant's service with plaintiff and 24 months after.	3 miles from Charles Street, Grosvener Sq.
1859, Mumford v. Gething, 7 C. B. N. S., 305.	Traveling in lace trade for any other house than plaintiff's.	Unlimited.	"Any part of the same ground:" *i. e.*, the district in which defendant was employed as traveler for plaintiff.
1862, Harmes v. Parsons, 23 Beav., 328.	Horse Hair Manufacture.	Unlimited.	200 miles from Birmingham.
1863, Clarkson v. Edge, 33 Beav., 227.	Gas Meter Manufacturer and Gas Engineer.	Ten years.	20 miles from Great Peter St, Westminster.
1869, Colt v. Tourle, 4 Ch., 654.	Covenant by purchaser of land that vendor should have exclusive right of supplying beer.	Unlimited.	Any public house erected on the land.
1869, Leather Cloth Co. v. Losont, 9 Eq., 345.	Manufacture or sale of patent leather cloth.	Unlimited.	Europe.
1874, Gravely v. Bernard, 18 Eq., 518.	Surgeon.	So long as plaintiff or his assigns should carry on business.	Parish of Newich and 10 miles round, excepting town of Lewes.
1875, Printing and Numerical Registering Co. v. Sampson, 19 Eq., 462.	Agreement by vendor of patents to assign to purchaser all after acquired patent rights of like nature.	Life-time of vendors.	Europe.

Name and Date of Case.	Trade or Business.	Extent of Restriction in Time.	Extent of Restriction in Space.
1875, May v. O'Neill, W. N., 179.	Solicitor.	Unlimited.	London Middlesex and Essex, and unlimited as to acting for clients of plaintiff's firm, or anyone who had been such client's during the terms of the articles.
1879, Davy v. Shannon, 4 Ex. Div., 81.	Outfitter and tailor.	Unlimited.	2 miles from Davenport.
1880, Rousillon v. Rousillon, 14 Ch. Div., 351.	Traveling in Champagne trade; setting up or entering into partnership in same trade.	Two years after leaving plaintiff's service as to traveling; ten, as to dealing on own account.	Unlimited.